



In response to the IAD, the Bankruptcy Trustee initially challenged NMFS's right to revoke the subject QS, alleging that NMFS's actions violated the bankruptcy stay.<sup>5</sup> NOI and NMFS reached a Stipulation whereby NOI withdrew its argument that NMFS's attempts to revoke the subject QS violated any provision of the Bankruptcy Code. NMFS and NOI agreed that NOI could submit a supplemental statement and pursue its administrative appeal within NMFS on other grounds.<sup>6</sup>

At the commencement of the administrative appeal, NOI was immediately provided RAM's complete file on this matter.<sup>7</sup> In response to a request by NOI, before NOI had to file its supplemental statement, I ordered that NMFS produce correspondence between NOI and NMFS concerning NOI's participation in the Crab Buyback Program.<sup>8</sup> The Financial Services Division [FSD] had conducted the Crab Buyback Program and provided documents.<sup>9</sup>

NOI submitted a Supplemental Statement In Support of Appeal on April 5, 2010.<sup>10</sup> I requested that NMFS submit a response to NOI's Supplemental Statement.<sup>11</sup> On June 11, 2010, NMFS submitted a response.<sup>12</sup> NOI did not file a reply memorandum but instead filed a Request for Order to Produce Documents and for Continuance.<sup>13</sup> I granted NOI a continuance to file a reply memorandum until I ruled on NOI's request for an order to produce documents.<sup>14</sup>

On March 1, 2011, I ruled on NOI's requests.<sup>15</sup> I granted it with respect to one document, namely the Reciprocal Data Access Agreement between NMFS and the State of Alaska, denied NOI's request for other documents and ordered that RAM provide a fuller written explanation of its calculation of which QS units in one fishery, Bering Sea Tanner crab fishery (BST), resulted from landings of F/V ST. MATTHEW and which QS units resulted from landings of F/V NORTHERN ORION. RAM provided the explanation.<sup>16</sup>

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<sup>5</sup> Letter from Michael B. McCarty, Chapter 7 Bankruptcy Trustee to OAA (July 28, 2009).

<sup>6</sup> Stipulation for Order on Motion for Declaration of Inapplicability of Automatic Stay or, in the Alternative, for Relief from Stay (Jan. 5, 2010). This was filed in the United States Bankruptcy Court for the Western District of Washington. NOI's bankruptcy case number is Bankruptcy No. 06-12683-SJS and is one of eight bankruptcy cases handled together, involving twelve named corporations and NOI's President individually.

<sup>7</sup> Letter from Michael McCarty, Chapter 7 Bankruptcy Trustee, to Office of Administrative Appeals (Jan. 28, 2010); Fed Ex Shipment Receipt (ship date Jan. 29, 2010).

<sup>8</sup> Order for Production of Documents (Mar. 3, 2010).

<sup>9</sup> Letter from Leo Erwin, Chief, FSD, to Mary Alice McKeen (Mar. 10, 2010).

<sup>10</sup> NOI Supplemental Statement, Letter from Heidi Craig, Attorney, to Mary Alice McKeen (Apr. 5, 2010), hereinafter NOI Supplemental Statement.

<sup>11</sup> Order Requesting Response by NMFS (Apr. 15, 2010).

<sup>12</sup> Response by NMFS to Order Requesting Response by NMFS (June 11, 2010) submitted by Jessica Gharrett, RAM Program Director, and Earl Bennett, Acting Chief, FSD (hereinafter NMFS Response).

<sup>13</sup> Letter from Heidi Craig, Attorney for Bankruptcy Trustee, to Mary Alice McKeen (June 28, 2010).

<sup>14</sup> Order Granting Trustee's Request for Continuance (July 6, 2010).

<sup>15</sup> Order Ruling on NOI's Requests and Establishing Deadline for RAM's Submission and NOI's Reply (Mar. 1, 2011).

<sup>16</sup> RAM's Supplemental Calculation, submitted by Jessica Gharrett, RAM Program Administrator

NOI filed a reply memorandum in support of its Supplemental Statement.<sup>17</sup> NOI also filed a motion for reconsideration of the order denying NOI additional discovery.<sup>18</sup> I have denied NOI's motion for reconsideration.<sup>19</sup>

I did not hold a hearing because the written record is sufficient to decide the merits of this appeal, as required by 50 C.F.R. § 679.43(g)(2), and there are no material facts in dispute for resolution at a hearing, as required by 50 C.F.R. § 679.43(g)(3).

Unless I indicate otherwise, when NOI is referred to, I mean collectively NOI, the Bankruptcy Trustee and PG Alaska Crab Investment, Co. (PGA). PGA is a secured creditor of NOI and owns 100% of NOI's stock, pursuant to an agreement with the Bankruptcy Trustee.<sup>20</sup>

### ISSUES

1. Did NMFS issue crab Quota Share in the Crab Rationalization Program to NOI based on the fishing history of the F/V NORTHERN ORION? If so, which QS units?
2. Did NMFS commit error by issuing QS to NOI based on the fishing history of the F/V NORTHERN ORION?
3. Does NMFS have the authority to revoke QS that it issued to NOI based on the fishing history of the F/V NORTHERN ORION?
4. Should NMFS be estopped from revoking QS that it issued to NOI based on the fishing history of the F/V NORTHERN ORION?
5. Does NOI have the right to an oral hearing on any issues relating to the revocation of QS that NMFS issued to NOI based on the fishing history of the F/V NORTHERN ORION?

### SUMMARY

The IAD is affirmed. In 2005, NMFS issued crab QS to NOI under the Crab Rationalization Program that was based on landings by the F/V NORTHERN ORION. NMFS should revoke the QS because NMFS purchased the fishing history of the F/V NORTHERN ORION, and any Quota Share that resulted from the fishing history of the F/V NORTHERN ORION, in the BSAI

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(Mar. 11, 2011) (hereinafter RAM's Supplemental Calculation).

<sup>17</sup> Reply Memorandum in Support of NOI's Supplemental Statement of Appeal, Letter from Counsel for NOI to Mary Alice McKeen (Apr. 15, 2011) (hereinafter NOI Reply Memorandum).

<sup>18</sup> Motion for Reconsideration, Letter from Counsel for NOI to Mary Alice McKeen (Apr. 15, 2011).

<sup>19</sup> See page 42 *infra*.

<sup>20</sup> NMFS Reply Memorandum at 1 note 1.

Crab Capacity Reduction Program or Crab Buyback Program. NMFS issued this Quota Share to NOI in violation of [1] the federal statute adopting the Crab Buyback Program, [2] the Crab Buyback regulation, 50 C.F.R. § 600.1103, [3] the Bid Agreement and Reduction Contract between NOI and NMFS and [4] the CRP regulation, 50 C.F.R. § 680.40(b)(4)(D), which prohibits NMFS from issuing Quota Share based on landings from vessels that were used to receive compensation in the Crab Buyback Program.

NMFS has authority to revoke Quota Share that it issued in error, because the person did not meet the requirements in regulation to receive the QS, even if the QS holder has not committed a prohibited act within section 307 of the Magnuson-Stevens Act. Under section 303A, NMFS may revoke QS “at any time in accordance with [the Magnuson-Stevens] Act,” which means at any time after NMFS has given the QS holder notice and opportunity to be heard on the proposed revocation.

Assuming *arguendo* that an appellate officer could prevent NMFS from revoking QS under a theory of government estoppel, NOI has not met the requirements to prove government estoppel.

First, NMFS did not commit affirmative misconduct. This problem arose because NOI held two LLP crab licenses: LLC 3035 and LLC 5166. NOI gave up LLC 3035 in the Crab Buyback Program but did not give up LLC 5166. RAM did not store the landing history of the F/V NORTHERN ORION correctly in its database and did not realize that landings from the F/V NORTHERN ORION were linked to LLC 3035 *and* LLC 5166. RAM therefore issued NOI, as the holder of LLC 5166, all the units of Quota Share that were based on landings from the F/V NORTHERN ORION. NMFS did not realize its mistake until May 2009, when RAM received a letter from an attorney asking RAM to investigate the potential error. RAM investigated and immediately began revocation proceedings. RAM’s mistake was clearly not affirmative misconduct.

Second, NOI has not shown that estoppel is necessary to prevent serious injustice. NOI was paid \$5.15 million dollars for LLC 3035, the ability of the F/V NORTHERN ORION to fish and crab QS based on the landings of the F/V NORTHERN ORION. But, by mistake, NMFS issued the crab QS anyway. Therefore, revocation of this QS is necessary to prevent a serious injustice, namely that NOI continues to harvest the crab that NOI was paid not to harvest in the Crab Buyback Program. The injustice of the situation is compounded because the Crab Buyback Program is being funded by assessments on other members of the BSAI crab fleet. Thus other members of the fleet are paying for the right to harvest this crab but NOI is still harvesting the crab, through an assignment of its annual IFQ to a crab harvesting cooperative.

NOI declared bankruptcy in 2006 and is still in bankruptcy proceedings. In 2008, PGA, a major creditor of NOI, entered into a Settlement Agreement with the Bankruptcy Trustee. PGA gave up some assets, forgave some debt and received 100% of NOI’s stock, which has allowed PGA to receive NOI’s annual IFQ for three crab fishing years. Before entering into the Settlement Agreement, Managing Member of PGA, checked with RAM as to the QS units that were held by NOI. PGA relied on that information in reaching the Settlement Agreement.

Even though revocation will take away a benefit from PGA, revocation will not cause injustice. NMFS paid for the right to harvest the crab that NOI-in-bankruptcy is continuing to harvest. It is manifestly unjust, and against public policy, for anyone to be harvesting this crab, *except* the other members of the fleet who are repaying the \$5.15 million dollars to NMFS, through assessments on their crab landings. Further, NOI directed that PGA receive the \$5.15 million dollars payout from NMFS. NMFS did this. Thus PGA received the payment under the Crab Buyback Program *and* has received payment for three years from assigning its IFQ to a crab cooperative *and* will continue to harvest the crab, unless NMFS is able to revoke this QS.

## FINDINGS OF FACT

I find the following facts, by a preponderance of evidence in the record. This appeal involves the intersection of three complex regulatory programs: License Limitation Program, Crab Buyback Program and the Crab Rationalization Program. Where helpful, I have included facts relevant to the regulations for these programs.

### LICENSE LIMITATION PROGRAM

1. On February 23, 1994, F/V ST. MATTHEW sank.<sup>21</sup>
2. On September 28, 1997, NOI bought the fishing history of F/V ST. MATTHEW from Polar Shell Fisheries, Inc.<sup>22</sup>
3. On January 1, 2000, the License Limitation Program for the North Pacific Crab and Groundfish Fisheries (LLP) went into effect.<sup>23</sup> NMFS issued original LLP crab licenses, with area/species endorsements, based on fishing between January 1, 1988, and December 31, 1994.<sup>24</sup>
4. NMFS issued LLP crab license LLC 3035 to NOI based on the fishing history of F/V NORTHERN ORION. The original qualifying vessel for LLC 3035 was F/V NORTHERN ORION.<sup>25</sup>
5. NMFS issued LLP crab license LLC 5166 to NOI based on the fishing history of F/V ST. MATTHEW. The original qualifying vessel for LLC 5166 was F/V ST. MATTHEW.<sup>26</sup>

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<sup>21</sup> Email from K.M. Lawrenson, Commercial Fishing Vessel Safety Coordinator, United States Coast Guard 17<sup>th</sup> District Juneau, to Jessica Gharrett (May 17, 2010), Exhibit 3 to NMFS Response.

<sup>22</sup> *Northern Orion, Inc.*, Appeal 02-0019 (Apr. 16, 2004) at 3. This decision, and all OAA decisions that I cite, are available on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/appeals/02-0019.pdf>.

<sup>23</sup> Final LLP Rule, 63 Fed. Reg. 52,642 (Oct. 1, 1998)(effective date January 1, 2000).

<sup>24</sup> 50 C.F.R. § 679.4(k)(5)(i)(general qualification period for LLP crab license); 50 C.F.R.

§ 679.4(k)(5)(ii)(endorsement qualification period for area/species endorsements on LLP crab license).

<sup>25</sup> The RAM Permit website lists the LLP licenses and the “original qualifying vessel” for each LLP license: <http://www.fakr.noaa.gov/ram/llp.htm>

6. On September 24, 2001, NMFS adopted a regulation that established an additional requirement to retain an LLP crab license. It is a requirement for a documented harvest in a recent participation period: January 1, 1996, to February 7, 1998. It has a special provision for LLP license holders who, by October 10, 1998, bought the qualifying history of a vessel that met the original requirements for an LLP license.<sup>27</sup>
7. RAM determined that NOI met the requirement to retain LLC 3035 and made no changes in LLC 3035.
8. On October 24, 2001, RAM issued an Initial Administrative Determination to revoke LLC 5166 because it determined that NOI did not meet the recent participation requirement to retain LLC 5166. NOI appeals the IAD.<sup>28</sup>
9. On August 5, 2003, NMFS adopted a regulation, which revised the recent participation period requirement.<sup>29</sup>
10. On April 16, 2004, OAA decided NOI's appeal and concluded that NOI had the right to retain LLC 5166. Interpreting the revised regulation, OAA held that an LLP license holder could meet the recent participation requirement to retain two LLP licenses based on a landing by one vessel in the recent participation period. NOI was able to retain LLC 5166 because the F/V NORTHERN ORION made a landing in January 1998.<sup>30</sup>

#### BSAI CRAB BUYBACK PROGRAM

11. On December 21, 2000, Congress passed PL 106-554 which, in section 144, imposed on the Secretary of Commerce the obligation to implement a fishing capacity reduction program for the Bering Sea/Aleutian Islands (BSAI) crab fisheries. It is known as the Crab Buyback Program.<sup>31</sup>

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<sup>26</sup> RAM Permit website: <http://www.fakr.noaa.gov/ram/llp.htm>.

Northern Orion, Inc., Appeal 02-0019 (Apr. 16, 2004) (NOI has the right to retain LLC 5166). The NMFS Alaska Region website lists the LLP licenses and the "original qualifying vessel" for each license. The original qualifying vessel for LLP crab license LLC 5166 is F/V ST. MATTHEW.  
<http://www.fakr.noaa.gov/ram/llp.htm>

<sup>27</sup> Final Rule, 66 Fed. Reg. 48,813 (Sep. 24, 2001) *adopting* 50 C.F.R. § 679.4(k)(5)(iii) (A) & (iv).

<sup>28</sup> Northern Orion, Inc., Appeal 02-0019 at 1 (Apr. 16, 2004).

<sup>29</sup> Final Rule, 68 Fed. Reg. 46,117 (Aug. 5, 2003).

<sup>30</sup> Northern Orion, Inc., Appeal 02-0019 at 1 (Apr. 16, 2004) *applying* 50 C.F.R. § 679.4(k)(5)(iii)(A).

<sup>31</sup> Public Law 106-554, Section 144, Appendix D, 114 Stat. 2763A-240 (Dec. 21, 2000); Proposed Rule, 67 Fed. Reg. 76,329, 76,329 (Dec. 12, 2002). For information on the four buyback programs that NMFS has conducted, including the BSAI Crab Buyback Program, go to the Financial Services Division [FSD] website: [http://www.nmfs.noaa.gov/mb/financial\\_services/buyback.htm](http://www.nmfs.noaa.gov/mb/financial_services/buyback.htm).

12. On December 12, 2003, NMFS adopted a final rule implementing the Fishing Capacity Reduction Program or Crab Buyback Program.<sup>32</sup>
13. On December 22, 2003, NMFS published a list of qualifying bidders, who can bid in the Crab Buyback Program.<sup>33</sup> To be a qualifying bidder, a person must hold a final (non-interim) LLP crab license.<sup>34</sup> NOI, as the holder of LLP 3035, was a qualifying bidder.<sup>35</sup>
14. On August 6, 2004, NMFS sent a second invitation to bid in the Crab Buyback Program, because of irregularities in the first.<sup>36</sup>
15. On September 22, 2004, NOI signed the Bid Agreement and Reduction Contract, whereby NOI offered to give up LLC 3035, the F/V NORTHERN ORION, and any and all licenses or fishing privileges based on the fishing history of the F/V NORTHERN ORION, in exchange for \$5,150,000.<sup>37</sup>
16. On October 28, 2004, NMFS, through the Financial Services Division, accepted NOI's bid and signed the Bid Agreement and Reduction Contract.<sup>38</sup>
17. On November 24, 2004, NMFS published notice of the successful bidders who would receive reduction payments in return for NMFS revoking each reduction permit and revoking each reduction vessel's fishing history. NOI was listed as a successful bidder.<sup>39</sup>
18. By letter dated November 30, 2004, NOI instructed NMFS to pay all amounts due NOI under the Crab Buyback Program to PGA and provided a bank account to which NMFS should wire the payment.<sup>40</sup>
19. On January 14, 2005, per NOI's instructions, NMFS paid \$5,150,000 to PGA.<sup>41</sup>

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<sup>32</sup> Final Rule, 68 Fed. Reg. 69,331 (Dec. 12, 2003). The Proposed Rule was published December 12, 2002. 67 Fed. Reg. 76,329.

<sup>33</sup> Notice of qualifying bidders and voters, 68 Fed. Reg. 71,082 (Dec. 22, 2003).

<sup>34</sup> 50 C.F.R. § 600.1103 (f)(1).

<sup>35</sup> Notice of qualifying bidders and voters, 68 Fed. Reg. 71,082, 71,086 (Dec. 22, 2003).

<sup>36</sup> Notice of second invitation to bid, 69 Fed. Reg. 51,236 (Aug. 18, 2004).

<sup>37</sup> The full title of the Reduction Contract is the Second Fishing Capacity Reduction Program Bid and Terms of Agreement for Capacity Reduction: Bering Sea and Aleutian Islands King and Tanner Crab, Exhibit F to NOI Supplemental Statement (Apr. 5, 2010).

<sup>38</sup> Bid Agreement and Reduction Contract signed by Michael Grable, Chief, Financial Services Division (Oct. 28, 2004), Exhibit 4 to Letter from Leo Erwin to Mary Alice McKeen (Mar. 10, 2010).

<sup>39</sup> Notice of fishing capacity reduction program payment tender, 69 Fed. Reg. 68,313, 68,321 (Nov. 24, 2004).

<sup>40</sup> Letter from NOI Representative to NMFS (Nov. 30, 2004), Exhibit 5 to Letter from Leo Erwin to Mary Alice McKeen (Mar. 10, 2010).

<sup>41</sup> Disbursement Request (Jan. 13, 2005) (\$5,150,000 wired to account of PGA), Exhibit 8 to Letter from Leo Erwin, FSD, to Mary Alice McKeen (Mar. 10, 2010).

## BSAI CRAB RATIONALIZATION PROGRAM

20. On March 2, 2005, NMFS adopted the final rule implementing the Crab Rationalization Program. It became effective April 1, 2005.<sup>42</sup> To receive QS under the CRP, a person must have held an LLP crab license.<sup>43</sup>
21. RAM created the Official Crab Rationalization Record and, after the CRP rule became effective, sent application packets to LLP crab license holders who, according to the Official Crab Rationalization record, met the landings requirements to receive Quota Share under the CRP. The LLP applications packets included a Summary of Official Record.<sup>44</sup>
22. RAM sent an application packet to NOI, as the holder of LLP crab license LLC 5166. The Summary of Official Record sent to NOI identified F/V ST. MATTHEW as the “Original Qualifying Vessel” for LLC 5166 and identified F/V NORTHERN ORION as the “Merged History Vessel.” The Summary identified five fisheries for which NOI was eligible to receive QS and contained “Estimated QS Units to be Issued” for each fishery.<sup>45</sup>
23. The application period for QS under the CRP was April 4, 2005, to June 3, 2005.<sup>46</sup>
24. On September 27, 2005, RAM determined that NOI’s President had submitted a timely application by faxing the application from Mexico, even though RAM did not receive it. RAM processed NOI’s application.<sup>47</sup>
25. In the application, NOI accepted RAM’s estimate of the percentages of the QS pools for which it was eligible and stated that it did not wish to make any contrary claims.<sup>48</sup> RAM therefore issued QS to NOI based on the estimates that were contained in the Summary of Official Record.<sup>49</sup>

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<sup>42</sup> Final Rule, 70 Fed. Reg. 10,174 (Mar. 2, 2005) *codified primarily at* 50 C.F.R. § 680.

<sup>43</sup> 50 C.F.R. § 680.40(b)(3)(i) & (ii).

<sup>44</sup> 50 C.F.R. § 680.40(f)(i); Summary of Official Record sent to NOI, Exhibit A to NOI Supplemental Statement.

<sup>45</sup> Summary of Official Record for NOI, Exhibit A to NOI Supplemental Statement.

<sup>46</sup> Notice of application period, 70 Fed. Reg. 11,194 (Mar. 8, 2005).

<sup>47</sup> Letter from Philip Smith, RAM Program Administrator, to NOI (Sep. 27, 2005).

<sup>48</sup> Application for QS by NOI (dated June 3, 2005), Exhibit B to NOI Supplemental Statement.

<sup>49</sup> Report on Quota Share Holdings by NOI, attached to Letter from Phil Smith, RAM Program Administrator to NOI (Sep. 27, 2005).

26. RAM determined crab QS units based on a vessel's crab landings in qualifying years and eligibility years that are specific to each crab fishery.<sup>50</sup> NMFS awarded NOI a total of 9,644,998 units of QS divided among five crab fisheries:

Bristol Bay red king crab (BBR)	1,924,688 QS units
Bering Sea snow crab (BSS),	6,337,936 QS units
Bering Sea Tanner crab (BST)	1,051,088 QS units
Pribilof red and blue king crab (PIK)	47,884 QS units
St. Matthew blue king crab (SMB)	283,402 QS units <sup>51</sup>

27. The qualifying periods for four of those five crab fisheries occurred entirely *after* February 23, 2004, the date that F/V ST. MATTHEW sank: Bristol Bay red king crab, Bering Sea snow crab, Pribilof red and blue king crab, and St. Matthew blue king crab.<sup>52</sup> The QS units in those four fisheries are therefore entirely based on landings by F/V NORTHERN ORION.

28. NMFS issued QS to NOI in a fifth crab fishery: Bering Sea Tanner crab fishery (BST). The qualifying years for BST were the best four of six seasons beginning with November 15, 1991.<sup>53</sup> F/V ST. MATTHEW had landings in the BST fishery in the 1991/1992 crab season, the 1992/1993 crab season and 1993/1994 crab season: 125,084 pounds; 169,067 pounds and 120,806 pounds respectively.<sup>54</sup>

29. The number of QS units in the BST fishery based on crab landings by F/V ST. MATTHEW is 712,672 units. The number of QS units in the BST fishery from landings by F/V NORTHERN ORION is 338,416 units.<sup>55</sup>

30. In 2006, NMFS adopted a rule that divided the Bering Sea Tanner crab fishery (BST) into the Eastern Bering Sea Tanner crab fishery (EBT) and the Western Bering Sea Tanner crab fishery (WBT). For each share of BST QS, NMFS issued one share of EBT QS and one share of WBT QS.<sup>56</sup>

31. Every year, a QS holder must apply by August 1 for an annual IFQ permit. If a QS holder does not submit a timely application for an annual IFQ permit, the QS holder will not receive an IFQ permit and will not receive an IFQ allotment of pounds of crab that it can land for that crab fishing year.<sup>57</sup>

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<sup>50</sup> Table 7 to part 680, "Initial Issuance of Crab QS by Crab QS Fishery."

<sup>51</sup> IAD at 2.

<sup>52</sup> Table 7 to part 680.

<sup>53</sup> Table 7 to part 680, Final Rule 70 Fed. Reg. 33,390, 33,396 (June 8, 2005).

<sup>54</sup> RAM's Response to Order Ruling on NOI's Requests and Establishing Deadline for RAM's Submission and NOI's Reply at 4 (Mar. 11, 2011).

<sup>55</sup> RAM's Supplemental Calculation (Mar. 11, 2011). NOI did not dispute RAM's calculation. NOI's Reply Memorandum.

<sup>56</sup> Final Rule, 71 Fed. Reg. 32,862, 32,863 (June 17, 2006).

<sup>57</sup> 50 C.F.R. § 680.4(f)(1).

32. IFQ is determined, crab fishery by crab fishery, after the State of Alaska announces the Total Allowable Catch [TAC] for that fishery.<sup>58</sup> RAM translates the QS units of each IFQ permit holder into a number of pounds that the IFQ permit holder can harvest in that fishery. IFQ permit holders may assign their IFQ pounds to a cooperative.<sup>59</sup>
33. NOI filed bankruptcy on August 11, 2006.<sup>60</sup> For the 2006/2007 crab fishing year, NOI did not apply by the August 1st deadline and did not receive an IFQ allocation in that year.<sup>61</sup>
34. NOI has submitted a timely IFQ application every year since then and thus has received an annual IFQ allotment in four crab fishing years: 2007/2008; 2008/2009; 2009/2010; 2010/2011. NOI has assigned its IFQ each year to Alaska King Crab Harvesters Cooperative.<sup>62</sup>
35. On February 5, 2007, the Managing Member of PGA obtained from RAM a printout of the crab QS held by NOI. It included all the QS that NMFS now seeks to revoke.<sup>63</sup> PGA was a secured creditor of NOI.<sup>64</sup>
36. On February 6, 2008, the Managing Member of PGA sent a letter to the RAM Program Administrator to determine what crab QS was held by NOI, Inc., and other companies owned by the NOI President. Managing Member informed RAM that he wanted this information because he was preparing for a settlement conference with the Bankruptcy Trustee.<sup>65</sup>
37. On February 7, 2008, RAM Program Administrator provided Managing Member with a print-out of the crab QS held by NOI. It included all the crab QS that NMFS seeks to revoke.<sup>66</sup>
38. In February 2008, PGA and another creditor reached an agreement with the Bankruptcy Trustee which was approved by the Bankruptcy Court in December 2008.<sup>67</sup> In reaching that agreement, Managing Member relied on the QS information he had gotten from RAM.

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<sup>58</sup> 50 C.F.R. § 680.40(k).

<sup>59</sup> 50 C.F.R. § 680.21(b)(3).

<sup>60</sup> *Sitkin Island, Inc., and Northern Orion, Inc.*, Appeal No. 06-0017 at note 1(Jan. 31, 2007).

<sup>61</sup> IAD (Aug. 7, 2006).

<sup>62</sup> RAM posts, yearly, the members of harvester cooperatives: <http://www.fakr.noaa.gov/ram/default.htm>.

<sup>63</sup> Facsimile from RAM Permit Specialist to Managing Member (Feb. 5, 2007), Exhibit H to NOI Supplemental Statement.

<sup>64</sup> Letter from Managing Member of PGA to Jessica Gharrett, RAM Program Administrator (Feb. 6, 2008), Exhibit I to NOI Supplemental Statement.

<sup>65</sup> Letter from Managing Member of PGA to Jessica Gharrett, RAM Program Administrator (Feb. 6, 2008), Exhibit I to NOI Supplemental Statement.

<sup>66</sup> Letter from Jessica Gharrett to Managing Member (Feb. 7, 2008) with printout, Exhibit J to NOI Supplemental Statement.

<sup>67</sup> Affidavit of Managing Member at ¶ 13; NOI Supplemental Statement at 4; Order Approving Settlement (filed December 11, 2008), Exhibit G to NOI Supplemental Statement.

39. In the settlement agreement, PGA surrendered certain collateral to the Estate, including approximately \$350,000 in cash, and forgave debt of more than five million dollars owed by NOI or the President of NOI.<sup>68</sup> In return, one hundred percent of NOI's stock was transferred to PGA's designee.<sup>69</sup> PGA designated its Managing Member to receive the stock. Managing Member has transferred a portion of the stock to his children.<sup>70</sup>
40. The present value of the QS is more than five million dollars and the value of NOI's annual IFQ is \$500,000. PGA received \$500,000 from the assignment of NOI's annual IFQ for three crab fishing years: 2008/2009; 2009/2010; 2010/2011. I make no finding whether PGA received the payment for the assignment of NOI's IFQ for 2007/2008.<sup>71</sup>
41. On May 6, 2009, RAM Program Administrator learned that RAM might have issued QS to NOI based on landings by the F/V NORTHERN ORION through a letter from XXXXXX XXXXXX (Attorney), who stated: "I am writing you on behalf of our client to notify you and request that you investigate further what appears to be a very large error regarding the amount of IFQ quota share issued to LLP 5166 which is now IFQ 29767."<sup>72</sup> Attorney stated he believed that RAM made a material mistake by allowing crab Quota Share that was based on the catch history of the F/V NORTHERN ORION, when the F/V NORTHERN ORION and the catch history of the F/V NORTHERN ORION had been accepted into the Buyback Program and bought for \$5,150,000.00.
42. RAM investigated and determined that NMFS had issued QS to NOI in error because NMFS issued QS to NOI that was based on the fishing history of F/V NORTHERN ORION.<sup>73</sup>
43. RAM made this mistake because RAM merged the landing history of the F/V ST. MATTHEW and the F/V NORTHERN ORION in creating the landings history attributable to LLC 5166 under the Crab Rationalization Program.<sup>74</sup>

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<sup>68</sup> Declaration of Michael B. McCarty, Chapter 7 Trustee, at ¶ 8 (July 6, 2010)(bankruptcy estate received approximately \$348,000); Declaration of Managing Member of PGA at ¶ 20 (Apr. 15, 2011) (PGA gave up \$300,000 of cash collateral). Mr. McCarty also stated that the estate received 25% of NOI's proceeds from the Exxon Valdez settlement, but did not put a value on that asset.

<sup>69</sup> Declaration of Michael B. McCarty, Chapter 7 Trustee, at ¶ 7 (July 6, 2010).

<sup>70</sup> Declaration of Managing Member of PGA at ¶ 20 (Apr. 15, 2011).

<sup>71</sup> Declaration of Managing Member of PGA at ¶ 20 (Apr. 15, 2011).

<sup>72</sup> Letter from Attorney to RAM to Jessica Gharrett, RAM Program Administrator (May 1, 2009).

<sup>73</sup> Summary of Official Record, Exhibit A to NOI Supplemental Statement; Email from Jessica Gharrett to Tracy Buck; email from Tracy Buck to Jessica Gharrett; email from Tracy Buck to Jessica Gharrett (May 18, 2009); IAD (June 23, 2009); Letter from Jessica Gharrett to Attorney (June 26, 2009). Tracy Buck was identified in prior correspondence as RAM Permits Supervisor. Letter from Jessica Gharrett to Managing Member (Feb. 7, 2008).

<sup>74</sup> Summary of Official Record, Exhibit A to NOI Supplemental Statement; Email from Jessica Gharrett to Tracy Buck; email from Tracy Buck to Jessica Gharrett; email from Tracy Buck to Jessica Gharrett (May 18, 2009); IAD (June 23, 2009); Letter from Jessica Gharrett to Attorney (June 26, 2009).

44. On June 23, 2009, RAM issued the Initial Administrative Determination that the crab QS that was based on the landings of F/V NORTHERN ORION should be revoked, subject to NOI's right to appeal.<sup>75</sup>

45. NOI received IFQs over four crab fishing years to harvest a total of approximately 300,000 pounds of Bristol Bay red king crab [BBR] and 1.27 million pounds of Bering Sea snow crab [BSS].

Crab fishing year	Fishery	Pounds
2007/2008	Bristol Bay red king crab	87,837
2008/2009	Bristol Bay red king crab	87,802
2009/2010	Bristol Bay red king crab	69,025
2010/2011	Bristol Bay red king crab	<u>63,980</u>
	Total	308,644
	Yearly average over four years	77,161

2007/2008	Bering Sea snow crab	356,977
2008/2009	Bering Sea snow crab	331,583
2009/2010	Bering Sea snow crab	271,932
2010/2011	Bering Sea snow crab	<u>307,407</u>
	Total	1,345,060
	Yearly average over four years	336,265 <sup>76</sup>

46. NOI received IFQs to harvest the following number of pounds in the Eastern Bering Sea Bairdi Tanner crab fishery [EBT] and Western Bering Sea Bairdi Tanner crab fishery [WBT]:

Crab fishing year	Fishery	Pounds
2007/2008	Eastern Bering Sea Bairdi Tanner crab	16,242
2008/2009	Eastern Bering Sea Bairdi Tanner crab	13,026
2009/2010	Eastern Bering Sea Bairdi Tanner crab	6,365
2010/2011	Eastern Bering Sea Bairdi Tanner crab	<u>closed</u>
	Total	35,633

Crab fishing year	Fishery	Pounds
2007/2008	Western Bering Sea Bairdi Tanner crab	10,259
2008/2009	Western Bering Sea Bairdi Tanner crab	7,246
2009/2010	Western Bering Sea Bairdi Tanner crab	closed
2010/2011	Western Bering Sea Bairdi Tanner crab	<u>closed</u>
	Total	17,505

<sup>75</sup> IAD (June 23, 2009).

<sup>76</sup> The IFQ pounds are from RAM's website, which lists the pounds allotted to each QS holder, by fishery and by year: <http://www.fakr.noaa.gov/sustainablefisheries/crab/rat/ram/permits.htm>.

47. NOI received IFQ to harvest 13,463 pounds of crab in the St. Matthew blue king crab fishery [SMB] in 2010/2011. This fishery has not been open in any other year since 2005.<sup>77</sup>
48. NOI has received no IFQ to harvest crab in the Pribilof Islands red and blue king crab fishery [PIK] because this fishery has not been open since 2005.
49. NOI remains in bankruptcy. PGA has advised the Bankruptcy Trustee that it will seek to void the Settlement Agreement if the subject QS is revoked.<sup>78</sup>
50. NOI's President was barred from discharging his debts in bankruptcy because of false statements that he made in the bankruptcy proceedings.<sup>79</sup>

## ANALYSIS

### 1. Did NMFS issue crab Quota Share in the Crab Rationalization Program to NOI based on the fishing history of the F/V NORTHERN ORION? If so, which QS units?

This is a tale of two LLP licenses and two vessels. In this appeal, it is helpful to remember:

<u>LLP License</u>	<u>Original Qualifying Vessel</u>	<u>Subject to Crab Buyback</u>
LLC 3035	F/V NORTHERN ORION	YES
LLC 5166	F/V ST. MATTHEW (sank February 1994)	NO

To receive QS under the CRP, a person had to hold an LLP crab license.<sup>80</sup> To implement the CRP, RAM is the administrative unit within NMFS that prepared an official crab rationalization record for each LLP license.<sup>81</sup> NOI held LLC 5166 and so RAM was under a regulatory obligation to determine what crab landings were attributable to LLC 5166.

RAM attributed the landings by the F/V ST. MATTHEW to LLC 5166 because the F/V ST. MATTHEW was the original qualifying vessel for LLC 5166. The original qualifying vessel for an LLP license was the vessel that made the landings between 1988 and 1994 which were the basis for NMFS to issue the original LLP license in 2000.<sup>82</sup>

<sup>77</sup> For a wealth of information on the BSAI crab fisheries, see RAM's annual BSAI Crab Rationalization Report: <http://www.fakr.noaa.gov/sustainablefisheries/crab/crfaq.htm#CRreports>.

<sup>78</sup> Declaration of Michael B. McCarty, Chapter 7 Trustee, at ¶¶ 11, 12 (July 6, 2010).

<sup>79</sup> NOI Supplemental Statement at 2 note 2.

<sup>80</sup> 50 C.F.R. § 680.40(b)(3)(i), (ii). A person can be an individual, corporation or other entity. 50 C.F.R. § 679.2. Federal regulation 50 C.F.R. 680.2 incorporates the definitions in 50 C.F.R. § 679.2 .

<sup>81</sup> 50 C.F.R. § 680.40(a)(2).

<sup>82</sup> 50 C.F.R. § 679.4(k)(5)(i)(general qualification period for LLP crab license); 50 C.F.R. § 679.4(k)(5)(ii)endorsement qualification period for LLP crab license)

RAM attributed the landings by the F/V NORTHERN ORION to LLC 5166 because NOI was able to retain LLC 5166 based on a landing by the F/V NORTHERN ORION during the recent participation period, as a result of an appeal decision interpreting the recent participation requirement.<sup>83</sup> That is why RAM merged the history of the F/V ST. MATTHEW and the F/V NORTHERN ORION in creating the official record for LLC 5166 and that is why RAM mistakenly issued crab QS to NOI, as the holder of LLC 5166, based on the history of the F/V ST. MATTHEW and the F/V NORTHERN ORION.

Fortunately, it is relatively easy to determine which QS is based on the F/V NORTHERN ORION and which is based on the F/V ST. MATTHEW. NMFS determined how much QS an applicant received based on a vessel's landings in qualifying years, eligibility years and recent participation seasons, which were specific to each of eight crab fisheries.<sup>84</sup>

NMFS issued approximately 9.6 million units of crab QS to NOI in five crab fisheries: Bristol Bay red king crab (BBR), Bering Sea snow crab (BSS), Bering Sea Tanner crab (BST), Pribilof red and blue king crab (PIK) and St. Matthew blue king crab (SMB). The eligibility years, qualifying years and recent participation seasons for four of these five crab fisheries -- Bristol Bay red king crab (BBR), Bering Sea snow crab (BST), Pribilof red and blue king crab (PIK) and St. Matthew blue king (SMB) -- were *entirely* after February 23, 1994, when F/V ST. MATTHEW sank.<sup>85</sup> Thus, it was physically impossible for NOI to have received *any* QS in these four fisheries based on landings by F/V ST. MATTHEW. The QS for these four fisheries is approximately 9.2 million QS units.

It is undeniable, and I therefore found, that NOI received all the QS in the following four fisheries based on landings by F/V NORTHERN ORION: Bristol Bay red king crab, Bering Sea snow crab, Pribilof red and blue king crab and St. Matthew blue king crab.

With respect to the fifth fishery – Bering Sea Tanner crab (BST) – the qualifying years and eligibility years began on November 15, 1991, *before* F/V ST. MATTHEW sank. I asked RAM to provide the basis for its calculation of which QS units in the BST fishery were from the F/V ST. MATTHEW and which QS units were from the F/V NORTHERN ORION.<sup>86</sup> RAM provided the basis for its calculations, which included the pounds of crab landings by the F/V

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<sup>83</sup> *Northern Orion, Inc.*, Appeal No. 02-0019 (Apr. 16, 2004), *interpreting* 50 C.F.R. § 679.4(K)(5)(iii)(A).

<sup>84</sup> Table 7 to 50 C.F.R. part 680.

<sup>85</sup> Table 7 to part 680 of 50 C.F.R § 680.

<sup>86</sup> Order Ruling on NOI's Requests and Establishing Deadline for RAM's Submission and NOI's Reply at 5 – 6 (Mar. 11, 2011)

ST. MATTHEW in the BST fishery in the three years before it sank.<sup>87</sup> In its reply, NOI did not dispute RAM's calculation.<sup>88</sup>

I therefore found that NMFS issued 712,672 QS units in the BST fishery to NOI based on landings by the F/V ST. MATTHEW, which NOI will keep, and 338,416 units of QS in the BST fishery based on landings by the F/V NORTHERN ORION, which should be revoked. The BST fishery has been divided into the Eastern and Western Bering Sea Tanner fishery and so the figures now are 712,672 QS units in EBT and WBT that NOI will retain and 338,416 units of WS in EBT and WBT that should be revoked.

## **2. Did NMFS commit error by issuing QS to NOI based on the fishing history of the F/V NORTHERN ORION?**

NOI offered no argument that it was entitled initially to receive QS that resulted from the fishing history of the F/V NORTHERN ORION.<sup>89</sup> NOI stated, "Even if the issuance of QS were contrary to the regulations, this does not answer the question in this appeal and recognized by the Administrative Judge: whether RAM acted correctly when it attempted to revoke the QS to remedy its error."<sup>90</sup> NOI goes on to argue that RAM did not act correctly in revoking the QS under a theory of government estoppel. I examine the estoppel argument later but first I analyze whether RAM was correct in its determination that it made a mistake when it issued QS to NOI that was based on the landing history of the F/V NORTHERN ORION.

It is clear beyond a shadow of a doubt that NMFS committed error by issuing QS to NOI based on the fishing history of the F/V NORTHERN ORION. I conclude NMFS's action violated the federal statute adopting the Crab Buyback Program, the Crab Buyback regulation, Regulations and the CRP regulations.

### **A. The issuance of the subject QS violated a federal statute.**

The Crab Buyback Program, or officially the "Fishing Capacity Reduction Program for the Crab Species Covered by the Fishery Management Plan for the Bering Sea/Aleutian Islands King and Tanner Crabs," was a direct result of an Act of Congress on December 21, 2000, which provided:

The Secretary of Commerce (hereinafter "the Secretary") shall, after notice and opportunity for public comment, adopt final regulations . . . to implement a fishing capacity reduction program for crab fisheries included in the Fishery

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<sup>87</sup> RAM's Reply to Order Ruling on NOI's Requests and Establishing Deadline for RAM's Submission and NOI's Reply (Mar. 11, 2011). In this document, RAM stated that 338,416 QS units were due to landings by the F/V NORTHERN ORION. In the IAD, the figure was 338,415. The difference is de minimis.

<sup>88</sup> NOI Reply Memorandum.

<sup>89</sup> NOI Supplemental Statement; NOI Reply Memorandum.

<sup>90</sup> NOI Reply Memorandum at 5 (emphasis in original).

Management Plan for Commercial King and Tanner Crab Fisheries in the Bering Sea and Aleutian Islands (hereinafter “BSAI crab fisheries”). In implementing the program the Secretary shall –  
. . . ;

(E) ensure that *vessels removed from the BSAI crab fisheries*, the owners of such vessels, and holders of fishery permits for such vessels forever relinquish any claim associated with such vessel, permits, *and any catch history associated with such vessel or permits that could qualify such vessel, vessel owner, or permit holder for any present or future limited access system fishing permits in the United States fisheries based on such vessel, permits, or catch history*; . . . .<sup>91</sup>

The F/V NORTHERN ORION was a “vessel[] removed from the BSAI crab fisheries.” The statute directly commands NMFS to ensure that the owner of NOI forever relinquishes its claim to any future limited access system fishing permits based on the catch history of the F/V NORTHERN ORION. NMFS violated that statute by awarding QS to NOI under the Crab Rationalization Program based on the catch history of the F/V NORTHERN ORION. NMFS continues to violate that statute by awarding annual IFQ permits based on that same catch history.

**B. The issuance of the subject QS violated the Crab Buyback regulation.**

The Crab Buyback regulation, 50 C.F.R. § 600.1103, states that each bidder “must,” in its bid, “offer to surrender, to have revoked, to have restricted, to relinquish, to have withdrawn, or to have extinguished by other means, in the manner that this section requires the reduction fishing interest.”<sup>92</sup> The term, “reduction fishing interest” includes, for each bid, “[a]ny other claim that could in any way qualify the owner, holder, or retainer of any of the reduction components, or any person claiming under such owner, holder, or retainer, for any present or future limited access system fishing license or permit in any United States fishery (including, but not limited to, any harvesting privilege or quota allocation under any present or future individual fishing quota system).<sup>93</sup>

When NMFS accepts a bid, as it did with NOI’s bid of \$5.15 million dollars, NMFS makes the reduction payment. In return for each reduction payment, the regulation states that NMFS will permanently:

- (1) Revoke each crab reduction permit;
- (2) Revoke each non-crab reduction permit;
- (3) Revoke each reduction fishing privilege . . . ;

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<sup>91</sup> Section 144(d)(1) of Public Law 106-54 – Appendix D, 114 Stat. 2763A-240 (Dec. 21, 2000). PL 106-54 was the Consolidated Appropriations Act of 2001. For history of the crab buyback program, see Final Rule, 68 Fed. Reg. 69,331, 69,332 (Dec. 12, 2003).

<sup>92</sup> 50 C.F.R. § 600.1103(h)(1)(i).

<sup>93</sup> 50 C.F.R. § 600.1103(b) (5) (reduction fishing interest defined).

(4) Effect relinquishment of each reduction fishing history for the purposes specified in this section by noting in the RAM Program records (or such other records as may be appropriate for reduction permits issued elsewhere) that the reduction fishing history has been relinquished under this section and will never again be available to anyone for any fisheries purpose; and

(5) Otherwise restrict in accordance with this subpart each reduction/privilege vessel and fully effect the surrender, revocation, restriction, relinquishment, withdrawal, or extinguishment by other means of all components of each reduction fishing interest.<sup>94</sup>

NMFS's issuance of crab Quota Share based on the fishing history of the F/V NORTHERN ORION clearly violates its obligation under (4) and (5). With respect to each task,

(1) NMFS revoked the crab reduction permit: LLC 3035.

(2) NOI had no non-crab reduction permit.

(3) The "reduction fishing privilege" means "the worldwide fishing privileges of a bid's reduction/privilege vessel."<sup>95</sup> I have no reason to doubt that this restriction was appropriately noted on F/V NORTHERN ORION's title<sup>96</sup> and that the F/V NORTHERN ORION has been withdrawn from all fishing activity.

(4) RAM did not effect relinquishment of the fishing history of F/V NORTHERN ORION because it did not note the relinquishment in its records regarding the merged history of LLC 5156. Thus, instead of the fishing history "never again [to be] available to anyone for any fisheries purpose," RAM issued QS to NOI based on this history.

(5) RAM obviously did not fully effect the surrender of NOI's reduction fishing interest because that included any possible claim whatsoever that NOI had to any future limited access program.

### **C. The issuance of the subject QS violated NOI's Bid Agreement and Reduction Contract.**

NOI's Bid Agreement and Reduction Contract is replete with provisions that clearly and unequivocally state that it will accept \$5,150,000 in return for three assets: LLP license LLC 3035; NOI's right to use the F/V NORTHERN ORION to fish in the BSAI crab fishery and any other fishery; and the fishing history of the F/V NORTHERN ORION. NOI identified LLC 3035 as the Crab Reduction permit.<sup>97</sup> NOI identifies the F/V NORTHERN ORION, O.N. 5889854, as the Reduction/Privilege Vessel.<sup>98</sup> NOI identified the fishing history of the F/V NORTHERN ORION as the Reduction Fishing History.<sup>99</sup>

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<sup>94</sup> 50 C.F.R. § 600.1103 (s).

<sup>95</sup> 50 C.F.R. § 600.1103 (b) (reduction fishing interest defined).

<sup>96</sup> 50 C.F.R. § 600.1103 (s)(3).

<sup>97</sup> NOI's Bid Agreement and Reduction Contract at 15.

<sup>98</sup> NOI's Bid Agreement and Reduction Contract at 18.

<sup>99</sup> NOI's Bid Agreement and Reduction Contract at 17.

With respect to the fishing history of F/V NORTHERN ORION, section 10 and 11 of NOI's Bid Agreement and Reduction Contract provides:

10. Retention of Reduction Fishing History. The Bidder expressly states, declares, affirms, attests, represents, warrants to NMFS that the Bidder retains, and is fully and legally entitled to offer and dispose of hereunder, *full and complete rights to the reduction/history vessel's full and complete reduction fishing history necessary to fully and completely comply with the requirements of section 11 hereof.*
11. Reduction Fishing History. *The Bidder surrenders, relinquishes, and consents to NMFS' permanent revocation of the following reduction fishing history: . . .*

*The reduction/history vessel's full and complete documented harvest of crab . . .*  
<sup>100</sup>

Paragraph 34 of NOI's Bid Agreement and Reduction Contract states:

34. Future Harvest Privilege and Reduction Fishing History Extinguished. Upon NMFS' reduction payment tender to the Bidder, the Bidder shall surrender and relinquish and consent to the revocation, restriction, withdrawal, invalidation, or extinguishment by other means (as NMFS deems appropriate), of *any claim in any way related to any fishing privilege derived, in whole or in part, from the use or holdership of the crab reduction permit and the non-crab reduction permit(s), from the use or ownership of the reduction/history vessel and the reduction/privilege vessel . . ., and from any documented harvest fishing history arising under or associated with the same which could ever qualify the Bidder for any future limited access fishing license, fishing permit, and other harvest authorization of any kind.*

It is hard to imagine how the contract could have been drafted any more broadly to provide that, once NOI received payment, NOI relinquished *any future limited access fishing license, fishing permit and other harvest authorization of any kind* derived, in whole in part, from the fishing history of the F/V NORTHERN ORION.

Section VIII is similarly exhaustive. By signing the Bid Form and Reduction Contract, NOI makes an

irrevocable bid offer to NMFS for the permanent surrender and relinquishment and revocation, restriction, withdrawl [sic], invalidation, or extinguishment by other means (as NMFS deems appropriate) of the crab reduction permit, any non-crab reduction permit(s), the reduction/privilege vessel's reduction fishing privilege, *and the reduction/history vessel's reduction fishing history* – all as

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<sup>100</sup> NOI's Bid Agreement and Reduction Contract at 3 – 4.

identified in the Bid Form and the Reduction Contract or as required under the final Rule, other applicable regulations, or the applicable law.<sup>101</sup>

Any one of these provisions make clear that NOI relinquished the right to receive crab QS based on the fishing history of the F/V NORTHERN ORION through NOI's Bid Agreement and Reduction Contract. Together, they make it impossible to come to any other conclusion. I conclude that, by issuing crab QS to NOI based on the fishing history of F/V NORTHERN ORION, NMFS violated the terms of NOI's Bid Agreement and Reduction Contract.

**D. The issuance of the subject QS violated the Crab Rationalization regulation.**

The CRP regulation at 50 C.F.R. 680.40(b)(4)(D) specifically provides:

(D) Landings made from vessels which are used for purposes of receiving compensation through the BSAI Crab Capacity Reduction Program may not be used for the allocation of CVO QS or CPO QS.<sup>102</sup>

F/V NORTHERN ORION was undeniably a vessel used for purposes of receiving compensation in the BSAI Crab Capacity Reduction Program. CVO QS means catcher vessel owner Quota Share. NMFS undeniably issued catcher vessel owner Quota Share, based on landings from the F/V NORTHERN ORION.

NOI did not submit any argument that NMFS did not violate this CRP regulation by awarding NOI the QS that resulted from landings by the F/V NORTHERN ORION. And it is hard to imagine any argument that could be made. I conclude that NMFS violated 50 C.F.R. 680.40(b)(4)(D) when it issued QS to NOI based on landings by F/V NORTHERN ORION.

NOI argues that, even though NMFS issued the subject QS in error, it cannot correct its error. I examine those arguments now.

**3. Does NMFS have the authority to revoke QS that it issued to NOI in error?**

NOI makes two arguments that NMFS does not have the authority to revoke the crab QS that it issued to NOI in error. First, NOI argues that NMFS does not have the authority to revoke any Quota Share that it issues in error. Second, NOI argues that, even if NMFS has authority to revoke in some instances, it did not seek to revoke the subject QS within a reasonable time and therefore cannot do so now.<sup>103</sup>

I conclude that NMFS has general authority to revoke QS that it issued in error. And I conclude that NMFS has the authority to revoke this QS even though NMFS initially issued it in 2005.

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<sup>101</sup> NOI's Bid Agreement and Reduction Contract at 18.

<sup>102</sup> Final Rule, 70 Fed. Reg. 10174, 10275 (Mar. 2, 2005), *adopting* 50 C.F.R. 680.40(b)(4)(D).

<sup>103</sup> NOI Supplemental Statement at 5 – 7; NOI Reply Memorandum at 5 – 7.

### **A. NMFS has general authority to revoke QS that it issued in error.**

NMFS states that it has the authority, and the duty, to revoke QS that it issued in violation of a federal statute and regulations: “NMFS must revoke the subject QS because it had no statutory or regulatory authority to issue it to NOI in the first place. Our original decision to issue was unlawful and must be set aside because it was in excess of our statutory and regulatory authority to have issued it under either the Buyback legislation or the regulations implementing the crab rationalization program.”<sup>104</sup>

NOI argues that NMFS only has the power given to it by statute or regulation, that the Magnuson-Stevens Act specifies that a permit can be revoked as a sanction if the permit holder commits one of eighteen prohibited acts, that NOI did not commit any of those prohibited acts and there NMFS cannot revoke the QS award it made to NOI.<sup>105</sup> NOI states: “Because NOI has not committed a prohibited act, NMFS does not have authority under the MSA [Magnuson-Stevens Act] to revoke NOI’s QS.”<sup>106</sup>

NOI is correct that NMFS only has the power given to it, express or implied, by statute or regulation. NOI is also correct that section 307 of the Magnuson-Stevens Act has a list of “prohibited acts.” Section 307 has a general prohibited act – a person may not “violate any provision of this Act or any regulation or permit issued pursuant to this Act” – and then seventeen specific prohibitions.<sup>107</sup> The specific prohibited acts are things like using a fishing vessel to engage in fishing after revocation of a permit, refusing to allow an officer to board the vessel to enforce the Act, resisting a lawful arrest for a prohibited act, assaulting an observer.<sup>108</sup>

NOI is also correct that section 308 of the Act allows NMFS to seek to revoke or suspend a permit as a “Permit Sanction” for violations of section 307. If NMFS seeks revocation of a permit as a permit sanction, NMFS must take into account the nature and gravity of the act, the degree of culpability of the violator and the violator’s history of prior offenses.<sup>109</sup> If NMFS seeks to revoke a permit as a permit sanction, NMFS proceeds under 15 C.F.R. part 904.<sup>110</sup>

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<sup>104</sup> NMFS Response at 5

<sup>105</sup> NOI Supplemental Statement at 5 – 6.

<sup>106</sup> NOI Supplemental Statement at 6.

<sup>107</sup> Section 307 of MSA, 16 U.S.C. § 1857 (1) (A) (general), (B) – (R) (specific prohibitions).

<sup>108</sup> Section 307 of MSA, 16 U.S.C. § 1857 (1)(B), (D), (F), (L).

<sup>109</sup> Section 308 of MSA, 16 U.S.C. § 1858 (2)(A), (B).

<sup>110</sup> 15 C.F.R. § 904.200(a)(“This subpart sets forth the procedures governing the conduct of hearings and the issuance of initial and final administrative decisions of NOAA involving alleged violations of the laws cited in § 904.1(c) and regulations implementing these laws, including civil penalty assessments and permit sanctions and denials.”). Section 904.1(c) provides: “The following statutes authorize NOAA to assess civil penalties, impose permit sanctions, issue written warnings, and/or seize and forfeit property in response to violations of those statutes.” The Magnuson-Stevens Act is one of those statutes. 15 C.F.R. § 904.1(c)(21).

I also agree with NOI that that section 313(j)(3) of the Magnuson-Stevens Act, 16 U.S.C. § 1862(j)(3), is not relevant to this appeal.<sup>111</sup> It provides that the North Pacific Fishery Management Council may change or repeal management measures for the BSAI crab fisheries. This means the Council may modify or repeal a *general* management measure, not a specific license.

But NOI is *not* correct that the Magnuson-Stevens Act, or any regulations issued under the Act, prevent NMFS from revoking a permit when NMFS issued the permit in error, even if the permit holder has not committed a prohibited act listed in section 307. I conclude that NMFS has the authority to revoke a license or permit that it initially issued in error, even if the permit holder does not subsequently commit a prohibited act.<sup>112</sup> I conclude that the issuance of a permit in error is, by itself, a sufficient basis for NMFS to revoke a permit.

**1) The general rule is that the government has the authority to revoke a license or permit that it issued in error.**

Courts have, with near uniformity, concluded that the government has the power to revoke a license on the grounds that the government issued the license in error, even if the statute or regulation does not expressly allow that.<sup>113</sup> An early statement of that principle is *American Trucking Associations v. Frisco Transportation*.<sup>114</sup> The Interstate Commerce Commission issued certificates of convenience and necessity to trucking companies and the certificates contained an error. The United States Supreme Court ruled that the government had the power to cancel the certificates and issue corrected certificates, even though the statute did not expressly give the ICC that power:

It is axiomatic that courts have the power and the duty to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake. A similar power is vested in the Interstate Commerce Commission. Section 17(3) of the Act creating the Commission, 49 U.S.C. § 17(3), provides that: “The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice.” This broad enabling statute, in our opinion, authorizes the correction of inadvertent ministerial errors. *To hold otherwise would be to say that once an error has occurred the Commission is powerless to take remedial steps.* This would not, as Congress provided, “best conduce to the ends of justice.” In fact, the presence of authority in administrative officers and tribunals

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<sup>111</sup> NOI Reply Memorandum at 8 - 9.

<sup>112</sup> NMFS did seek revocation as a permit sanction under section 307 of the Act and I would not have authority to hear that case if it did.

<sup>113</sup> The only possible exceptions to that statement, as a general proposition, that NOI provided, or that I found, are *Gorbach v. Reno*, 219 F. 3d 1087 (9th Cir. 2000), and *Cabo Distributing Co., Inc. v. Brady*, 821 F. Supp. 601 (N.D. Cal. 1992), and, which I analyze, respectively, at pages 25 – 26 and 28 – 29 *infra*.

<sup>114</sup> 358 U.S. 133 (1958).

to correct such errors has long been recognized – probably so well recognized that little discussion has ensued in the reported cases.<sup>115</sup>

In *Gun South, Inc., v. Brady*, the Eleventh Circuit Court of Appeals allowed the government to suspend permits to import assault rifles:

[The plaintiff] correctly notes that neither the [Gun Control] Act nor its regulations explicitly authorizes the suspension [of permits]. Despite this absence of express authority, we conclude that the Bureau [of Alcohol, Tobacco and Firearms] must necessarily retain the power to correct the erroneous approval of firearms import applications.<sup>116</sup>

In *Kudla v. Modde*, a federal district court allowed a city to revoke a business license that the city had issued in error:

Rather, plaintiff claims under 42 U.S.C. § 1983 that his right to due process was denied because the Board’s determination to revoke the Class “C” license is inconsistent with Section 8-93 which permits revocation of a license only for “gross incompetence, gross neglect, deliberate misrepresentation or willful failure to comply with the requirements of the ordinance.” Inherent in plaintiff’s argument is the supposition that a license once granted by whatever means, becomes irrevocable less the standard set in Section 8-93.

In the context of the legal and procedural posture of this case, the Court must disagree. It is clear that the imposition of a license for the privilege of pursuing a vocation or business is permissible. Intrinsic in this long-held view is the position that “[t]he power of the state to require a license implies the power to revoke a licensee which has been improperly issued.” *Butcher v. Maybury*, 8 F. 2d 155, 159 (CA 9, 1925).<sup>117</sup>

The cases relied on by NOI largely agree on this general principle.<sup>118</sup> In *Macktal v. Chao*, the court stated succinctly:

Although this Court has never expressly so held, it is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions. *See, e.g., Belville Mining Co. v.*

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<sup>115</sup> *American Trucking Associations, Inc., v. Frisco Transportation Co.*, 358 U.S. 133, 145 (1958)(citation and footnote omitted) (emphasis added). The error was that the certificates did not require that the services of the trucking company be auxiliary to the railroad companies that owned the trucking companies.

<sup>116</sup> 877 F. 2d 858, 862 (11<sup>th</sup> Cir. 1989).

<sup>117</sup> *Kudla v. Modde*, 537 F. Supp. 897, 89 (E.D. Mich. 1982), *aff’d without opinion*, 711 F. 2d 1057 (6<sup>th</sup> Cir. 1983) (citations omitted).

<sup>118</sup> NOI Reply Memorandum at 5 – 8.

*United States*, 999 F. 2d 989, 997 (6<sup>th</sup> Cir. 1993); *Dun & Bradstreet Corp. v. United States Postal Service*, 946 F. 2d 189, 193 (2d Cir. 1991); *Gun South, Inc. v. Brady*, 877 F. 2d 858, 862 (11<sup>th</sup> Cir. 1989); *Iowa Power & Light Co. v. United States*, 712 F. 2d 1292, 1297 (8th Cir. 1983); *Trujillo v. General Electric Co.*, 621 F. 2d 1084, 1086 (10<sup>th</sup> Cir. 1980); *United States v. Sioux Tribe*, 222 Ct. Cl. 421, 616 F. 2d 485, 493 (1980); *Albertson v. FCC*, 182 F. 2d 397, 399 (D.C. Cir. 1950).<sup>119</sup>

In *Dun & Bradstreet Corporation Foundation v. United States Postal Service*, the Second Circuit Court of Appeals stated:

It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review.<sup>120</sup>

In *United States v. Prieto v. United States*, a federal district court stated:

There can be no dispute that administrative agencies have inherent power to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider. This power does not depend on statutory authority.<sup>121</sup>

The general rule clearly is that if the government has the power to issue a license because an applicant meets certain conditions, the government is presumed to have the power to revoke the license if the applicant, in fact, did not meet those conditions. This is the right rule. This rule allows the government to fix its mistakes. Otherwise, once the government made an error, the public would have to live with it forever.

## **2) The general rule applies to NMFS's authority to revoke crab QS.**

NMFS issued crab QS pursuant to the Magnuson-Stevens Act. The question therefore is whether the general rule – the government can revoke a license that it issued in error -- applies to NMFS's authority to revoke fishing privileges issued under the Magnuson-Stevens Act. As an initial matter, I have no reason to conclude that NMFS's authority should be limited in a way that other government agencies are not.

The Act itself and the CRP regulations strongly support the conclusion that crab QS is revocable, if NMFS issued it in error. Section 303A of the Magnuson-Stevens Act states in part:

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<sup>119</sup> 286 F. 3d 822, 825-26 (5<sup>th</sup> Cir. 2002).

<sup>120</sup> 946 F. 2d 189, 193 (2d Cir. 1991) (citation omitted).

<sup>121</sup> 655 F. Supp. 1187, 1191 (D.D.C. 1987)(citation omitted).

Limited access privilege, quota share, or other limited access system authorization established, implemented, or managed under this Act . . . may be revoked, limited, or modified *at any time in accordance with this Act*, including revocation if the system is found to have jeopardized the sustainability of the stock or the safety of fishermen; . . .<sup>122</sup>

Section 303A does not state that QS can be revoked only if the permit holder has done something bad, as defined by section 307. It states that QS may be revoked at any time in accordance with the Act. I conclude that the proper interpretation of the phrase “in accordance with this Act” is that NMFS may revoke QS if it shows that it issued the QS in error, after giving the QS holder notice and opportunity to be heard on the proposed revocation. NOI received notice through the IAD and received its opportunity to be heard through the appeal process.

The CRP regulation defines crab QS as a revocable fishing privilege:

*Harvesting and processing privilege.* QS and PQS allocated or permits issued pursuant to this part do not represent either an absolute right to the resource or an interest that is subject to the “takings” provision of the Fifth Amendment of the U.S. Constitution. Rather, such QS, PQS, or permits represent only a harvesting or processing privilege *that may be revoked or amended pursuant to the Magnuson-Stevens Act and other applicable law.* . . .<sup>123</sup>

NMFS explained in the commentary to the final CRP rule:

Quota Share represents *an exclusive but revocable privilege* that provides the QS holder with an annual allocation to harvest a specific percentage of the total allowable catch (TAC) from a fishery. IFQs are the annual allocations of pounds of crab for harvest that represent a QS holder’s percentage of the TAC. A harvester’s allocation of QS for a fishery is based on the landings made by his or her vessel in that fishery.<sup>124</sup>

Finally, the CRP regulation expressly refers to the possibility that a crab IFQ permit might be revoked pursuant to an administrative appeal under the appeal regulation, 50 C.F.R. § 679.43, as well as a permit sanction proceeding under 15 C.F.R. part 904. The CRP regulation states at 50 C.F.R. § 680.4(d):

- . . . . A crab IFQ permit is valid under the following circumstances:
- (i) Until the end of the crab fishing year for which the permit is issued;
  - (ii) Until the amount harvested is equal to the amount specified on the permit;
  - (iii) Until the permit is modified by transfers under § 680.43; or

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<sup>122</sup> Section 303A of Magnuson-Stevens Act, 16 U.S.C. § 1853a (b) (2) (emphasis added).

<sup>123</sup> 50 C.F.R. § 680.40(1)(emphasis added).

<sup>124</sup> Final Rule, 70 Fed. Reg. 10,174, 10,174 – 10,175 (Mar. 2, 2005) (emphasis added).

(iv) *Until the permit is revoked, suspended, or modified pursuant to § 679.43 or under 15 C.F.R. part 904.* [emphasis added].

The nature of QS is that it is a revocable privilege. I find no valid reason to interpret the Magnuson-Act as preventing the agency from revoking QS that it issued in clear violation of the express provisions of a federal statute and regulations establishing the BSAI Crab Buyback Program and Crab Rationalization Program. “To hold otherwise would be to say that once an error has occurred [NMFS] is powerless to take remedial steps.”<sup>125</sup>

I acknowledge that it is not *necessarily* true that the power to issue a license includes the power to revoke it. The question is whether the regulatory or statutory scheme should be interpreted in accord with the general rule or as an exception to it.

In *Gorbach v. Reno*, cited by NOI, the court held that, even though the Attorney General had the power to grant citizenship through naturalization proceedings, she did not have the power to revoke citizenship in denaturalization proceedings; only a district court could denaturalize a citizen.<sup>126</sup> The court noted: “The former power [to naturalize] is typically exercised wholesale, the latter [the power to denaturalize] retail.”<sup>127</sup> Naturalization proceedings are typically repetitive, routine and relatively straightforward. Denaturalization proceedings are highly adversarial, far rarer than naturalization, and catastrophic to the individuals involved.

*Gorbach* does not support NOI’s position. The issues in revoking crab QS, because the applicant did not meet the requirements to receive QS, are the very same issues in denying QS initially, because the applicant did not meet the requirements to receive QS. Both decisions are retail, i.e., they are made after individual notice and opportunity to be heard by the affected person. There is no reason to believe these two decisions should be made by different processes.

Further, the question in *Gorbach* was not *whether* the government could initiate denaturalization proceedings at all. The issue was which branch of government could do it. Here, NOI’s position means that no one in the government can revoke this crab QS, unless NOI committed a prohibited act. NOI has not justified its position, which is that if a person receives crab QS once, and they had no legal right to receive it, they have a right to keep it forever, simply because they got it mistakenly in the beginning. I conclude that the better position is that, if NMFS issued crab QS to a person that had no right to receive it, NMFS has the right to correct that mistake, after giving the person notice and opportunity to be heard.

### **C. NMFS may revoke the subject QS even though NMFS issued it in 2005.**

NOI states that, even if NMFS can sometimes revoke QS, it cannot revoke in this instance because it did not act within a reasonable time. RAM issued this QS in 2005 and began

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<sup>125</sup> *American Trucking Associations, Inc., v. Frisco Transportation Co.*, 358 U.S. 133, 145 (1958).

<sup>126</sup> 219 F. 3d 1087 (9<sup>th</sup> Cir. 2000), cited in NOI Supplemental Statement at 6.

<sup>127</sup> *Id.* at 1095.

revocation proceedings in 2009. NOI states that a period of four years between the issuance of QS and the proposed revocation is unreasonable.<sup>128</sup>

This is not a basis to prevent NMFS from revoking the subject QS for several reasons. First, the Magnuson-Stevens Act states that quota share may be revoked “at any time in accordance with this Act.”<sup>129</sup> I interpret that to mean at any time, after NMFS has provided the QS holder with notice and opportunity to object to the proposed revocation. The Act does not state that, if NMFS does not revoke QS within a reasonable period of time, Quota Share becomes irrevocable. Quota Share is *always* an “exclusive but revocable privilege.”<sup>130</sup>

Second, the fact that NOI was issued this QS in 2005, and has received annual IFQ for four years, is not a reason that NOI should continue to receive this benefit. NOI only has the QS because NMFS made a mistake. The length of time that NOI has held this QS is not a reason to perpetuate the error. Normally, if something is wrong, it is worse if it continues. If someone mistakenly received IFQ for one year, it is worse if they receive it two years, worse still three years, and worse yet, in perpetuity. If the mistake does not come to light for four years, as here, that is no reason not to correct the mistake as soon as it comes to light. It is unfortunate that it did not come to light sooner but it did not. But NMFS acted reasonably, and actually swiftly, when the mistake came to light.

Third, NOI misreads much of the authority on which it relies. NOI cites reconsideration cases for the proposition that an agency has the inherent power to reconsider and change a decision, but only if it does so within a reasonable period of time.<sup>131</sup> The problem is the word “reconsideration.” NOI is correct that if an agency, or a court, wants to reconsider a decision it has just made, and substitute a new decision in place of the decision it has just made, it needs to do that rather quickly, probably in weeks, not years. But NMFS is not, in that sense, issuing a reconsideration decision.

NMFS is *not* claiming the right to revoke this QS as a continuation of its issuance of QS in 2005. NMFS is not claiming the right to make its new decision retroactive to 2005. Therefore, NMFS is not under an obligation to act within any period of time measured by reference to NMFS’s action in 2005 *because NMFS is not seeking to make its new decision effective retroactively to 2005*. NOI’s cases support the conclusion that NMFS can correct this error, if NMFS gives the

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<sup>128</sup> NOI Supplemental Statement at 5, *quoting Gratehouse v. United States*, 512 F. 2d at 1109.

<sup>129</sup> 16 U.S.C. § 1853a(b)(2).

<sup>130</sup> Final CRP Rule, 70 Fed. Reg. 10,174, 10,174 (Mar. 2, 2005). *Cf. King v. United States*, 65 Fed. Cl. 385 (Fed. Cl. 2005), where the court found the Board could not reconsider its decision eleven months after issuing its original decision. The statute in *King* stated that correction of military records by a military correction board “is final and conclusive on all officers of the United States,” except when procured by fraud, 65 Fed. Cl. at 394, which is just about the opposite of a statute that a fishing privilege may be revoked “at any time.” 16 U.S.C. § 1853a(b)(2).

<sup>131</sup> *Macktal v. Chao*, 286 F. 3d 822 (5<sup>th</sup> Cir. 2002); *Dun and Bradstreet Corp. Foundation v. United States Postal Service*, 946 F. 2d 189 (2d Cir. 1991); *Gratehouse v. United States*, 512 F. 2d 1104 (Ct. Cl. 1975); *King v. United States*, 65 Fed. Cl. 385 (Fed. Cl. 2005).

QS holder notice and opportunity to contest the revocation and if NMFS corrects the error prospectively.<sup>132</sup> That is exactly what NMFS is trying to do.

NOI relies heavily on *Prieto v. United States*, where the court found that the Bureau of Indian Affairs acted arbitrarily in revoking the trust status of a parcel of land of an Indian tribal member under the guise of reconsidering an earlier decision granting the trust status.<sup>133</sup> The court found that the BIA acted arbitrarily relying, in part, on the fact that the time limit for agency reconsideration was one month and the agency treated a mislabeled “appeal” that it received nine months after its original decision as grounds for it to “reconsider” its earlier decision.<sup>134</sup> Here, RAM is not acting outside of any prescribed time limit and is seeking to revoke a benefit which is expressly defined as a “revocable privilege.”

But what the court found “most compelling” was that the BIA reopened the case on pretextual grounds, namely it said that the tribal member had committed fraud but the agency had before it no real evidence of fraud.<sup>135</sup> Here, there is no evidence that RAM is seeking to revoke this QS on “pretextual” grounds. RAM is seeking to revoke this QS for the reason that it has given, namely it determined, correctly, that it issued this QS in violation of a federal statute and regulations for two programs.

Fourth, if the agency is under a duty to act within a reasonable time, it would be measured by when it learned of the problem. RAM learned of its possible error on May 6, 2009. RAM issued its IAD on June 23, 2009. RAM acted one and a half months after it learned of its error and that is certainly a reasonable time to investigate, consult with counsel and prepare an IAD seeking revocation.

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<sup>132</sup> See *Macktal v. Chao*, 286 F. 3d 822 (5<sup>th</sup> Cir. 2002)(upholding administrative board’s decision to reconsider, and deny, attorney fee award; board gave applicant notice of its intent to reconsider); *Dun & Bradstreet Corporation Foundation*, 946 F. 2d 189 (2d Cir. 1991)(affirming the Post Office’s reconsideration decision regarding one refund because Post Office reconsidered within a reasonable time and applicant had notice; remanding another refund because Post Office did not give written notice and may not have reconsidered within a reasonable time.); *Gratehouse v. United States*, 512 F. 2d 1104, 1110 (Ct. Ct. 1975)(“In sum, where a prejudicial procedural error has been committed, and a reasonable time for reconsideration has run, the purpose of a correction of that error can only be to determine the merits of the dispute *prospectively*.”) (emphasis in original). Cf. *Civil Aeronautics Board v. Delta Airlines, Inc.*, 367 U.S. 316 (1961)(statute provided that Board, “after notice and hearings” may alter a certificate of public convenience and necessity; Board could not, under the rubric of reconsideration, alter a certificate after it had gone into effect, without new notice and new hearing); *King v. United States*, 65 Fed. Cl. 385 (Fed. Cl. 2005) (court found reconsideration defective on several grounds including failure to give plaintiff written notice).

<sup>133</sup> *Prieto v. United States*, 655 F. Supp. 1187, 1191 - 1194 (D.D.C. 1987).

<sup>134</sup> *Id.* at 1191.

<sup>135</sup> *Id.* at 1193 – 1194. And, in fact, the court estopped the agency from revoking the trust status of the parcel because it found that the BIA had made false statements to the tribal member. *Id.* at 1194 – 1195.

**D. *Cabo Distribution Co. Inc., v. Brady* is not persuasive.**

NOI cites *Cabo Distribution Co. Inc., v. Brady*, for the proposition that NMFS cannot revoke QS it issued in error.<sup>136</sup> *Cabo Distribution* involved the Bureau of Alcohol, Tobacco and Firearms (BATF) revoking a COLA, or certificate of label approval, for the label “Black Death Vodka.” The court stated that, although BATF had the authority to issue the label, it did not have explicit or implicit authority to revoke the label.<sup>137</sup> And, if the government could revoke, it had to revoke the license within a reasonable time. The government was seeking to revoke the label three years after it approved the label and the court concluded that was not a reasonable time.<sup>138</sup>

I do not find *Cabo Distribution* persuasive for the proposition that NMFS does not have authority to revoke the subject QS for many reasons. First, on the general principle, it is wrong and does not represent the majority view of the law. The majority, and better, view is that an agency has implicit authority to revoke a license if it issued the license in error.<sup>139</sup> Otherwise, the government cannot correct mistakes.

Second, unlike QS, the regulations and statutes cited in *Cabo* do not state that the right to use the label was a revocable privilege.

Third, the government did not provide due process to the plaintiff because there were material facts in dispute and the government did not hold a hearing before it revoked the label. The situation sounded like a procedural nightmare, with the government trying to claim that a meeting with the appellants constituted their opportunity to be heard, but the government did not tell the plaintiffs the purpose of the meeting and there was no record of the meeting. Here, NOI has had notice, an opportunity to be heard on the record, in a formal process, which will allow judicial review of the decision, if NOI pursues that.

Fourth, the court found that the government was seeking to revoke the label for reasons that were not within the agency’s province, namely confusing the public, rather than the label not accurately communicating the contents in the bottle. Here, NMFS seeks to revoke on grounds that should have prevented NMFS from initially issuing the QS.

Fifth, NMFS seeks to revoke the subject QS because RAM discovered a new fact, namely the subject QS was based on fishing history that had been purchased in the crab buyback program. The government in *Cabo* did not discover anything new. In fact, the government stated it was relying on its administrative expertise to revoke the label. Presumably, it had that expertise when it approved the label.

Sixth, the court stated that “unusual circumstances” could justify a three-year period between issuance and revocation. This case presents very unusual circumstances, namely the government paid NOI to not harvest the crab that it wishes to continue to harvest. The situation would be

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<sup>136</sup> 821 F. Supp. 601 (N.D. Cal. 1992).

<sup>137</sup> *Id.* at 612 – 613.

<sup>138</sup> *Id.*

<sup>139</sup> *See* pages 21 – 24 *supra*.

comparable if the government had paid the plaintiff not to use the Black Death label, assessed the payment to the other label holders, but the plaintiff still wanted to use it. But overall, the court's absolutist position – the agency could never revoke – was really dicta, in light of the many other reasons that the court found the agency's actions invalid.

#### **4. Should NMFS be estopped from revoking QS that it issued to NOI based on the fishing history of the F/V NORTHERN ORION?**

NOI does not seriously contest that NMFS issued the subject QS to NOI in error in violation of the Crab Buyback statute, the Crab Buyback regulation, its Bid Agreement and Reduction Contract and the Crab Rationalization Program regulation. NOI argues that, even if NMFS issued the subject QS in error, and even if NOI has the authority to revoke it, NMFS should be prevented from exercising its authority under a theory of government estoppel.<sup>140</sup>

It is important to remember that, under a theory of estoppel, the applicant admits that it does not meet the requirement in regulation or statute for a benefit or license but argues that, nonetheless, it should receive or retain the benefit or license because of affirmative misconduct by the government. Equitable estoppel is an extreme remedy – ordering the government not to follow a regulation – for an extreme situation.

##### **A. Prior OAA decisions do not establish that an appellate officer can order relief under a theory of equitable estoppel.**

I have grave doubts whether an appellate officer, deciding an appeal under the Crab Rationalization Program, could order NMFS not to follow a CRP regulation based on a theory of equitable estoppel. NOI states that I do have that authority.<sup>141</sup> NOI cites no regulation or statute that authorizes an appellate officer, or the NMFS Regional Administrator, to grant equitable relief from the application of a Crab Buyback regulation or a CRP regulation.<sup>142</sup>

NOI cites prior OAA decisions, which occurred in two contexts: equitable tolling of the application deadline for late applicants in some limited access programs and claims of misadvice.<sup>143</sup> Neither establish that an appellate officer could order NMFS not to follow a regulation in deciding an appeal under the Crab Rationalization Program.

The equitable tolling decisions are not equitable estoppel decisions, despite the word equitable in both. The equitable tolling decisions interpreted the regulation for a timely application in certain limited access programs as procedural, and not substantive, and the application deadline

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<sup>140</sup> NOI Supplemental Statement at 7 – 9; NMFS Reply Memorandum at 10 – 15.

<sup>141</sup> NOI Reply Memorandum at 9 – 10.

<sup>142</sup> For an example of a statute and regulation that authorizes equitable relief in an administrative appeal, see 7 U.S.C. § 6998(d)(Secretary of Agriculture has authority to grant “equitable or other types or relief” to an appellant); 7 C.F.R. § 11.9(e) (Director of National Appeals Division of the Department of Agriculture has authority to grant equitable relief to the same extent as agency).

<sup>143</sup> NOI Supplemental Statement at 9 – 10.

tollable.<sup>144</sup> The regulation at issue in this appeal -- the prohibition against awarding QS based on a landing history which NMFS purchased in the Crab Buyback Program – is completely substantive. It is not procedural.

In the misadvice decisions, the applicants claimed equitable estoppel and argued that they should receive a license because they did not meet the landing requirements for a license because of misadvice from NMFS staff.<sup>145</sup> None of the applicants proved that they met the test for government estoppel and therefore an administrative judge within NMFS has never recommended that an applicant, who did not meet the requirements in regulation for a permit, receive a permit nonetheless based on a claim of government estoppel.

But since prior OAA decisions have addressed whether an applicant has proven equitable estoppel, since NOI has requested that I decide its equitable estoppel claim, since NMFS has not objected to my deciding the issue, and since the record is sufficient to decide the claim, I assume *arguendo* that I can decide this claim and evaluate whether NOI has proven it.

### **B. NOI does not meet the test for government estoppel.**

The test for government estoppel is stated with small variations by different courts but the essential elements are the same. I will take the formulation in *Watkins v. United States Army*, where the Ninth Circuit Court of Appeals “estopped” the United States Army from preventing a service member from reenlisting even though the service member acknowledged his homosexuality and a regulation made homosexuality a nonwaivable disqualification for reenlistment.<sup>146</sup>

The Supreme Court has never ruled whether estoppel may run against the government but, assuming that it can, there is no dispute that the government cannot be estopped on the same grounds as a private individual.<sup>147</sup> Two additional elements must be proven. First, “a party seeking to raise estoppel against the government must establish affirmative misconduct going

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<sup>144</sup> See *John T. Coyne*, Appeal No. 94-0012, Decision on Reconsideration (May 24, 2006) (application deadline tollable under Individual Fishing Quota Program for Pacific halibut and sablefish); *Chris R. Ophelm, Sr.*, Appeal No. 00-0006 at 4 (Dec. 27, 2002) (application deadline tollable under License Limitation Program); *James Doe*, Appeal No. 07-0006 at 4 – 5 (Mar. 1, 2010) (application deadline for crab Quota Share under CRP tollable). Cf. *Earl D. Cagle*, Appeal No. 10-0003 at 5 (Aug. 13, 2010). (“Under the doctrine of equitable tolling, an agency may accept a late application if allowing equitable tolling is a valid interpretation of the regulations for that particular program . . . .”)(declining to decide whether equitable tolling is a valid interpretation of the regulations in the Charter Halibut Limited Access Program).

<sup>145</sup> *Sherry L. Tuttle and Lori Whitmill*, Appeal No. 96-0010 (Dec. 3, 1999) (Vessel Moratorium Program – predecessor to LLP); *Jamie Marie, Inc.*, Appeal No. 04-0002 at 5 – 6 (Apr. 13 2006) (same); *William Renfro*, Appeal No. 02-0051 at 8 (Mar. 17, 2004) (LLP); *Samish Maritime, Inc.*, Appeals Nos. 96-0007, 96-0008 (Dec. 2, 1999) (LLP); *Magne Nes*, Appeal No. 02-0044 at 4 (Mar. 5, 2004) (LLP). I was the administrative judge in the last four of these appeals.

<sup>146</sup> *Watkins v. United States Army*, 875 F. 2d 699, 707 (9<sup>th</sup> Cir. 1989), *cert denied*, 498 U.S. 957 (1990).

<sup>147</sup> *Id.* at 706.

beyond mere negligence.”<sup>148</sup> Second, “estoppel will only apply where the government’s wrongful act will cause a serious injustice, and the public’s interest will not suffer undue damage by imposition of the liability.”<sup>149</sup>

The four traditional elements of estoppel are as follows: “(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has the right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former’s conduct to his injury.”<sup>150</sup>

NOI does not prove the additional elements. Therefore, NOI may not prevent NMFS from revoking the subject QS under a theory of government estoppel.

### **1) RAM did not commit affirmative misconduct.**

The court stated in *Watkins*, “There is no single test for detecting the presence of affirmative misconduct; each case must be decided on its own particular facts and circumstances. Affirmative misconduct does require an affirmative misrepresentation or affirmative concealment of a material fact by the government, although it does not require that the government intend to mislead a party.”<sup>151</sup> Affirmative misconduct is not negligent conduct. Affirmative misconduct must go beyond mere negligence.<sup>152</sup>

The RAM Program Administrator explained how RAM’s mistake occurred:

NOI had purchased the history of the F/V ST MATTHEW and under this exemption [from the recent participation requirement] was able to retain LLC-5166. In late 2004 this LLC’s history should have been recalculated as a result of the Buyback Program, which extinguished credit for any landings made by the F/V NORTHERN ORION. However, NMFS was focused on the Buyback, and there was no management or programmatic need to do so at that time. All other LLCs derived from Buyback vessels were based on the history of one vessel only, including LLC-3035 for which the F/V NORTHERN ORION was the sole OQV [original qualifying vessel]; all were revoked under the Buyback and did not result in crab QS issuance. LLC-5166 continued to exist because the F/V ST MATTHEW was its OQV [original qualifying vessel]. At the time of Crab Rationalization implementation, the F/V NORTHERN ORION’s contribution to the history of LLC-5166 for RPP [recent participation period] purposes was not obvious from the manner in which the LLCs and their histories are stored and referenced in NMFS’ database; and so potential over-issuance of crab QS for LLC-5166 remained hidden. NMFS remained unaware of the error until a

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<sup>148</sup> *Id.* at 707 (internal quotations and citation omitted).

<sup>149</sup> *Id.* at 707 (internal quotations and citation omitted).

<sup>150</sup> *Id.* at 709.

<sup>151</sup> *Id.* at 707.

<sup>152</sup> *Id.* at 707

knowledgeable constituent brought the potential excessive QS issuance to RAM's attention in May, 2009, which time RAM took immediate action to investigate and remedy the situation.<sup>153</sup>

What is the "affirmative misrepresentation" or "affirmative concealment" that NOI states that RAM made? RAM did issue a certain number of QS units to NOI. When Managing Member inquired what QS units were held by NOI, RAM staff, in writing, gave correct information, i.e., the QS units that were held by NOI. RAM did not give false information.

In giving this information, RAM staff did not affirmatively misrepresent or affirmatively conceal the fact that QS is revocable. RAM staff did *not* say that "these are the QS units held by NOI and NMFS will not seek to revoke these QS units from NOI, even if NMFS determines it issued the QS to NOI in error."

NOI states that NMFS affirmatively misrepresented that NOI was eligible to receive QS by issuing the QS initially, issuing annual IFQ permits to NOI and confirming to Managing Member the number of QS units that NOI held. But I have found, and there is no factual dispute, that RAM did not know until May 2009 that NOI was, in fact, not eligible to receive the subject QS.<sup>154</sup> So how can RAM be guilty of affirmative misrepresentation or affirmative concealment if it did not know the true facts? NOI gives two answers. Neither are credible arguments for why RAM's actions constituted affirmative misconduct.

**a. RAM had a duty to maintain the official record for the CRP.**

NOI states that RAM committed affirmative misconduct because it was a mistake in a database that RAM had a duty to maintain:

RAM cannot claim to have "inadvertently," "unknowingly," or "mistakenly" relied on data that was its responsibility to accumulate and accurately maintain. It is a logical and regulatory fallacy to argue, as NMFS does, that RAM can act "correctly" or "consistent with the regulations" when it acts based on an information data base that it was responsible for maintaining and that it failed to accurately maintain. RAM's serial misrepresentations based on errors it introduced into the Official Record data base establish "affirmative misconduct."<sup>155</sup>

NOI's basic argument appears to be that RAM, by definition, committed affirmative misconduct because it had a duty to maintain and prepare the Official Record for the Crab Rationalization Program.

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<sup>153</sup> NMFS Response at 2. See Findings of Fact 41, 42, 43 and pages 38 – 41 *infra*.

<sup>154</sup> Findings of Fact 41, 42, 43. See pages 38 – 41 *infra*.

<sup>155</sup> NOI Reply Memorandum at 11.

NOI's argument is completely without merit. A mistake by a government agency is not "affirmative misconduct" simply because it was a mistake in something the government agency had a duty to do. It is hard to imagine that a mistake would be about anything other than something that the government agency had a duty to do and do correctly. NOI's standard would make just about every mistake by the government affirmative misconduct. That is clearly an invalid standard.

**b. RAM had the information in its records.**

NOI states that RAM must be charged with knowledge that NOI was not eligible to hold the subject QS because RAM's records had the true facts, namely that it had attributed the landings of the F/V NORTHERN ORION to LLC 5166. This is also an invalid standard for affirmative conduct because many, if not most, government mistakes involve misstating or overlooking something that is somewhere in its records. A standard for affirmative misconduct that encompasses a large number of mistakes is clearly far too broad because estoppel is reserved for extreme situations.

RAM's records unquestionably contained the fact that RAM attributed the landing history of the F/V NORTHERN ORION to LLC 5166. It was plainly stated in the Summary of Official Record that RAM provided to NOI in 2005.<sup>156</sup> But RAM did not realize the significance of this data.

Courts have uniformly *not* found affirmative misconduct simply because the correct information was in the government's records. The government did not commit affirmative misconduct when a Social Security representative erroneously told a woman she was not eligible for benefits,<sup>157</sup> when a government agent gave incorrect information that salaries of employees were reimbursable under Medicaid,<sup>158</sup> when a staff member of a planning agency gave a permit holder incorrect information about when a permit expired.<sup>159</sup>

In each of these situations, the correct information was obviously in government records: the correct rules for eligibility for a Social Security benefit, the correct rules for Medicaid, the correct expiration date of the permit. Yet the government was not estopped from enforcing the regulatory requirements.

**c. RAM's actions are nowhere near instances of affirmative misconduct.**

RAM's actions are not comparable to the three decisions cited by NOI where the government found affirmative misconduct. NOI relies primarily on *Watkins v. United States Army* for the proposition that government is charged with knowledge of what is in its records.<sup>160</sup> In *Watkins*,

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<sup>156</sup> Summary of Official Record for NOI, Exhibit A to NOI Supplemental Statement.

<sup>157</sup> *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981)(per curiam).

<sup>158</sup> *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984).

<sup>159</sup> *S&M Investment Co. v. Tahoe Regional Planning Agency* (9<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 1087 (1991).

<sup>160</sup> NOI Reply Memorandum at 12 – 13.

the court concluded that when the Army tried to prevent the serviceman from reenlisting in 1981, the Army knew the true facts as to his sexual orientation based on the following: the serviceman first acknowledged his homosexuality when he enlisted in 1967; he signed an affidavit that he was a homosexual in 1968; he was denied a security clearance because of his homosexuality in 1972; he was allowed to remain in the Army in 1975, after an investigation concluded that his homosexuality did not affect his, or his company's, performance; he received a security clearance in 1977, after an investigation concluded that his "homosexual tendencies" should not prevent the clearance.

The government was *not* simply charged with knowledge of a fact simply because it was somewhere in its records. Based on this detailed history of actions beginning in 1967, the court easily concluded that the Army knew the true facts regarding the service member's sexual orientation yet allowed him to reenlist three times. Because the Army knew the true facts, the court held that the Army affirmatively misrepresented to him that he was eligible for reenlistment.<sup>161</sup>

The other two situations involved landowners. In *Prieto v. United States* the Bureau of Indian Affairs was prevented from revoking the trust status of land because the BIA made false statements to the tribal member that led her to take money from a trust account and put it in a commercial account and then the BIA revoked the trust status because of the tribal member's actions.<sup>162</sup>

In *United States v. Wharton*, the Bureau of Land Management was prevented from taking title to land that the family had lived on for over forty years because it made false statements to the family that they could not apply to get title to the land and then the law changed and they could no longer apply for title.<sup>163</sup>

***Although RAM renewed NOI's IFQ for four years, there is nothing in the record to even hint that RAM did that, knowing that NOI was, in fact, not eligible to hold that QS.*** RAM did not make any false statements. RAM mistakenly issued QS in 2005, gave accurate information as to QS holdings, promptly investigated an allegation of error, promptly began revocation proceedings and has continued to issue IFQ pending final agency action on NOI's appeal. I conclude that RAM's actions clearly do not constitute affirmative misconduct.

#### **B. Estoppel is not necessary to prevent serious injustice.**

"Even when affirmative misconduct has been shown, the government cannot be estopped unless its acts also threaten to work a serious injustice and the public's interest will not be unduly damaged by the imposition of estoppel."<sup>164</sup> Even if NMFS's action in issuing the QS were affirmative misconduct, NOI must show that estoppel is necessary to prevent serious injustice

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<sup>161</sup> *Id.* at 701 – 05, 707-08.

<sup>162</sup> *Prieto v. United States*, 655 F. Supp. 1187 (D.D.C. 1987).

<sup>163</sup> *United States v. Wharton*, 514 F. 2d 406 (9<sup>th</sup> Cir. 1975).

<sup>164</sup> *Watkins v. United States Army*, 875 F. 2d at 708.

and that estoppel will not unduly damage the public's interest. I conclude that NOI has shown neither.

NOI was paid \$5.15 million dollars – the amount it asked – for assets: LLC 3035, withdrawal of the F/V NORTHERN ORION from fishing, and all fishing privileges that could be based on the fishing history of the F/V NORTHERN ORION. But, by mistake, NMFS issued Quota Share in five crab fisheries based on the fishing history of the F/V NORTHERN ORION. The two fisheries which comprise NOI's largest holdings are Bristol Bay red king crab and Bering Sea snow crab. In round numbers, NOI's QS has translated into 300,000 pounds of Bristol Bay red king crab over four years, at an average of 75,000 pounds per year, and 1.2 million pounds of Bering Sea snow crab over four years, at an average of 300,000 pounds per year.<sup>165</sup>

But the point is that, whatever the amounts, NOI is still harvesting the crab that NOI was paid not to harvest. Far from causing serious injustice, I conclude that NMFS's proposed action is necessary to prevent serious injustice. The serious injustice would be if NOI continued to harvest, year after year, the crab which it was paid not to harvest.

The injustice of the situation is compounded because the Crab Buyback Program is being funded by assessments on the remaining members of the BSAI crab fleet. NMFS paid the money to successful bidders in the Crab Buyback Program. But NMFS is recouping this money through fees on crab landings of "post-reduction fishermen."<sup>166</sup>

The post-reduction fishermen, or the remaining members of the crab fleet, are the ones who are actually paying the \$5.15 million dollars that NMFS paid to NOI.<sup>167</sup> Thus, other members of the fleet are paying for the right to harvest this crab but NOI is still harvesting the crab, through assignment of its annual IFQ to a crab harvesting cooperative.

NOI argues that revocation would cause injustice because PGA now owns 100% of NOI stock through a Settlement Agreement with the Bankruptcy Trustee, which occurred in 2008. Before entering into the Settlement Agreement, Managing Member of PGA obtained from RAM information on the QS units held by NOI and relied on that information in reaching the Settlement Agreement with the Bankruptcy Trustee.

Even though revocation will take away a benefit from PG Alaska, I conclude that revocation will not cause serious injustice. First and foremost, NMFS paid for the right to harvest the crab that NOI-in-bankruptcy is continuing to harvest. It is manifestly unjust, and against public policy, for anyone to be harvesting this crab, *except* the other members of the fleet who are the rightful owners of this QS and who are paying \$5.15 million dollars to NOI so NOI will not harvest this QS. This, alone, would be sufficient to show that revocation is not unjust.

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<sup>165</sup> Finding of Fact 45. The information is on the RAM Permit website.

<sup>166</sup> Final Rule, 68 Fed. Reg. 69,331, 69,332 (Dec. 12, 2003)

<sup>167</sup> Final Rule, 70 Fed. Reg. 54,652 (2005) *adopting* 50 C.F.R. § 600.1104, "Industry Fee System for Fishing Capacity Reduction Loan."

Further, PGA's claim of serious injustice is undermined by a crucial fact. It was actually PGA that received the Crab Buyback payment. At NOI's direction, NMFS paid \$5.15 million dollars to PGA.<sup>168</sup> Thus, PGA received the \$5.15 million dollar payment, which was supposed to reduce the capacity of the BSAI crab fleet, but PGA has harvested this crab for three years,<sup>169</sup> PGA has received \$500,000 per year from assigning the privilege, and now PGA wants the government to be estopped from correcting its error so it can continue to harvest this crab and have the right to, at some point in the future, sell this QS and receive payment for it again.

PGA asks RAM to quantify the benefit to other QS holders if NMFS revokes the QS, in terms of how much QS would be returned to each QS holder and the value of that QS.<sup>170</sup> The exact numbers are not important. If the QS is revoked, it will be redistributed to the other members of the fleet, in proportion to the amount of QS they hold. So too will NOI's annual IFQ pounds, and the annual revenue from either harvesting them directly or assigning them to a cooperative.

PGA even states that I should hold a hearing to compare the benefit to other QS holders from revocation with the harm that revocation would cause Managing Member of PGA, his children (to whom he has transferred ownership of some of NOI's stock) and other creditors of NOI, should PGA seek succeed in voiding the Settlement Agreement.<sup>171</sup>

It is a preposterous suggestion and would be an impossible task: comparing the balance sheets of Managing Member, his children, NOI's other creditors, with the balance sheets of other fishery participants, to determine, based on who-knows-what-factors, whether the benefits to the other QS holders from revoking the QS outweigh the harms to Managing Member, his children and NOI's other creditors. It is preposterous because, among other reasons, the other QS holders are paying for the right to harvest this crab.

I note that, although PGA relied on RAM's information as to how many QS units that NOI held, when it made the Settlement Agreement with the Bankruptcy Trustee, I cannot determine whether that reliance, overall, was detrimental to PG Alaska. In the Settlement Agreement, PGA gave up assets but has received \$500,000 from assigning NOI's annual IFQ for three years. That was a windfall because NOI should never have received that IFQ. Further, NOI is still in bankruptcy, the debts of the NOI President have not been discharged in bankruptcy and PGA has notified the Bankruptcy Trustee that it will seek to undo the Settlement Agreement.

In light of the payments PGA has received for three years, and the possibility of undoing the Agreement, I cannot determine whether, overall, PG Alaska's reliance on RAM's representations was detrimental.<sup>172</sup> I do not need to decide that question because reliance alone is insufficient to

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<sup>168</sup> Finding of Fact 18, 19.

<sup>169</sup> NOI has received IFQ for four years but the record is not clear whether PGA received the funds from NOI's assignment in 2007/2008.

<sup>170</sup> NOI Reply Memorandum at 15 – 17; NOI Motion For Reconsideration (Apr. 15, 2011).

<sup>171</sup> NOI Reply Memorandum at 15 – 17.

<sup>172</sup> *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 61 – 62 (1984) (“In this case the consequences of the Government's misconduct were not entirely adverse. Respondent did

estop the government. NOI must show affirmative misconduct, serious injustice and lack of undue harm to the public interest.

### **C. Estoppel would result in undue damage to the public's interest.**

I conclude that estoppel would damage the public interest for the same reasons that estoppel is not necessary to avoid serious injustice. Estoppel would completely undermine the Crab Buyback Program. Estoppel would allow NOI to keep crab QS based on the fishing history of the F/V NORTHERN ORION, when NMFS paid NOI to give that up in the Crab Buyback Program.

None of the decisions cited by NOI, for any point, for any reason, have anything remotely resembling the Buyback Program: [1] the party seeking to prevent the government from taking something away from them had actually been paid by the government for that very thing; [2] the government was recouping that payment from the other members of a defined group and thus estoppel would hurt the other members of the group.

The situation of the army sergeant in *Watkins v. United States* would be analogous to NOI's situation if the Army had paid him a lump sum settlement to leave the Army, assessed the settlement against the remaining members of his company, he received the money but wanted to stay in the Army anyway and under a theory of estoppel, he was permitted to remain in the Army. The court specifically found that the other members of the company were not hurt by estoppel because the serviceman was an exemplary soldier.

The situation of the landowners in *Prieto* and *Wharton* would be analogous to NOI's situation if neighboring landowners had voted to buy the landowner's property, the government paid the price that the landowner requested, the government assessed the neighboring landowners the purchase price, the landowners decided they wanted to stay on the property and, under a theory of estoppel, they kept the land. The neighbors of the landowners were not hurt if their neighbor was allowed to keep the land or keep the land in trust status.

The Buyback Program also distinguishes this appeal from *Fierce Packer*.<sup>173</sup> In *Fierce Packer*, NMFS granted an LLP license even though NMFS had granted another LLP license based, in part, on the same fishing history. Although the applicant in *Fierce Packer* bought the vessel's fishing history from a bankruptcy trustee, the applicant in *Fierce Packer* was not seeking to keep the very same fishing history that he had sold to NMFS.<sup>174</sup>

The public's interest would be unduly damaged by estoppel in this situation. The public's interest has been damaged because, for four years, NOI has harvested crab which it was paid not to harvest. But it would practically be beyond comprehension by the general public, the fishing

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receive an immediate benefit as a result of the double reimbursement. Its detriment is the inability to retain money that it should never have received in the first place.”)

<sup>173</sup> *RJ Fierce Packer*, Appeal No. 00-0004 (Dec. 18, 2000).

<sup>174</sup> It also appears that the bankruptcy proceeding was over and the debtor likely discharged. *Id.*

community in general and the BSAI crab fleet in particular, if after NMFS discovered its error, under a theory of “government estoppel,” NMFS had to let it continue.

**5. Does NOI have the right to an oral hearing on any issues relating to the revocation of QS that NMFS issued to NOI based on the fishing history of the F/V NORTHERN ORION?**

NOI has the right to notice and opportunity to be heard before NMFS revokes crab QS which it has issued to NOI.<sup>175</sup> This does not mean that NOI has the right to an oral hearing. An appellant has the right to a hearing if the record is insufficient on which to reach judgment, without a hearing, and the appeal meets the requirements in 50 C.F.R. § 679.43(g)(3).

The appeal regulation provides at 50 C.F.R. § 679.43(g):

**(g) Hearings.**

The appellate officer will review the applicant’s appeal and request for hearing, and has discretion to proceed as follows:

(1) Deny the appeal;

(2) *Issue a decision on the merits of the appeal, if the record contains sufficient information on which to reach final judgment;* or

(3) Order that a hearing be conducted. The appellate officer may so order only if the appeal demonstrates the following:

(i) *There is a substantial and genuine issue of adjudicative fact for resolution at a hearing.* A hearing will not be ordered on issues of policy or law.

(ii) The factual issue can be resolved by available and specifically identified reliable evidence. *A hearing will not be ordered on the basis of mere allegations or denials or general description of positions and contentions.*

(iii) The evidence described in the request for hearing, if established at hearing, would be adequate to justify resolution of the factual issue in the way sought by the applicant. A hearing will not be ordered if the evidence described is insufficient to justify the factual determination sought, even if accurate.

(iv) Resolution of the factual issue in the way sought by the applicant is adequate to justify the action requested. A hearing will not be ordered on factual issues that are not determinative with respect to the action requested. [emphasis added]

NOI argues that it meets the requirements for an oral hearing in 50 C.F.R. § 679.43(g)(3).<sup>176</sup> I conclude the record contains sufficient information on which to fairly decide this appeal, without a hearing, as required by 50 C.F.R. § 679.43(g)(2). I conclude that this appeal presents no substantial and genuine issues of adjudicative fact for resolution at a hearing. The standard is the same as whether there are material disputes of fact. I conclude there are none.

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<sup>175</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>176</sup> NOI Supplemental Statement at 12 – 13; NOI Reply Memorandum at 15 – 17.

**A. There are no material disputes of fact whether NMFS issued the subject QS in error and whether NMFS has the legal authority to revoke it.**

NOI did not submit any argument that NOI had a right to receive this QS initially. NMFS submitted a legal argument on whether NMFS has the legal authority to revoke this QS.

**B. There are no material disputes of fact that prevent resolution of whether RAM committed affirmative misconduct.**

NOI argues that an oral hearing is necessary to decide its estoppel claim.<sup>177</sup> On the question of affirmative misconduct, NOI states that I should hold a hearing to inquire into the circumstances of how RAM made its initial mistake and why it is revoking now. NOI states that I should order RAM to detail efforts it made to check whether RAM made this same mistake with respect to any of the other twenty-four vessels whose history was purchased in the Crab Buyback Program.<sup>178</sup>

I based my legal conclusion that RAM did not commit affirmative misconduct on the facts, as I found them, namely that RAM issued the subject QS to NOI in 2005 as a result of a mistake in how it stored its landing data for LLC 5166 and that RAM learned of its mistake in May 2009 through the letter from the attorney which is in the RAM file.<sup>179</sup>

The evidence in the record to support these findings is overwhelming:

- The complete lack of any reason why RAM would have intentionally issued QS to NOI based on landings by the F/V NORTHERN ORION in 2005, when NMS had just bought the fishing history of the F/V NORTHERN ORION in the Crab Buyback Program;
- The Summary of the Official Record for LLC 5166 which showed that F/V NORTHERN ORION was a merged history vessel for LLC 5166;<sup>180</sup>
- The letter from Attorney to the RAM Program Director, received May 6, 2009, asking RAM to investigate whether RAM had issued crab QS to LLP 5156 which could not be based on the fishing history of the F/V ST. MATTHEW because that vessel sank in 1994 and which appeared to be based on the fishing history of the F/V NORTHERN ORION, a vessel that participated in the Crab Buyback Program;<sup>181</sup>
- Email by Ms. Gharrett to Tracy Buck, RAM Supervisory Permit Specialist, noting that she had just received the request from Attorney and asking Ms. Buck to investigate; two emails from Ms. Buck that, after investigating, she believed that the situation was that F/V NORTHERN ORION was a crab buyback vessel whose

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<sup>177</sup> NOI Reply Memorandum at 15 – 17.

<sup>178</sup> Notice of fishing capacity reduction program payment tender, 69 Fed. Reg. 68, 313 (Nov. 24, 2004).

<sup>179</sup> Findings of Fact 41, 42, 43

<sup>180</sup> Summary of Official Record for NOI, Exhibit A to NOI Supplemental Statement.

<sup>181</sup> Letter from Attorney to RAM Program Administrator (May 1, 2009, date stamped as received May 6, 2009).

history was not effectively revoked because RAM had merged the history of the F/V ST. MATTHEW with the F/V NORTHERN ORION and given LLC 5166 credit for all the landings made by F/V NORTHERN ORION;<sup>182</sup>

- The issuance of an IAD on June 23, 2009, a month and a half after RAM received the letter from Attorney;
- The statements in the IAD, signed by the RAM Program Administrator, that RAM had merged the history of the F/V ST. MATTHEW and F/V NORTHERN Orion,<sup>183</sup> that RAM investigated the issuance of this QS based on the letter from Attorney,<sup>184</sup> and that RAM concluded that it issued the QS in error.<sup>185</sup>

NOI offered no other hypothesis as to how this mistake occurred. NOI offered no other evidence as to how this mistake occurred. An issue is not a substantial and genuine issue of adjudicative fact merely because an appellant says it is. The appellant must submit a reasonable hypothesis in support of its position, and a modicum of evidence, to show a substantial and genuine issue of adjudicative fact. NOI has not done this with regard to the circumstances of this error. In fact, NOI relied on these facts to argue its legal position that RAM committed affirmative misconduct because it made a mistake in how it maintained the records of the landings of the F/V NORTHERN ORION.

**B. There are no material disputes of fact that prevent resolution of whether estoppel is necessary to prevent serious injustice or will unduly damage the public interest.**

I relied on the following uncontroverted facts. NOI was paid \$5.15 million dollars for assets including the fishing history of the F/V NORTHERN ORION. RAM awarded QS to NOI based on the fishing history of the F/V NORTHERN ORION. PGA received the \$5.15 million dollar payment. Other members of the BSAI crab fleet are paying for the \$5.15 million dollar payout to NOI/PGA through landing fees. I also relied on the nature of the annual allocation process and that, in the future, any crab not harvested by NOI in a particular crab fishery will be harvested by the other participants in that fishery.

**C. I do not base my decision on issues as to which there might be factual disputes.**

I wish to note what I have not decided. RAM stated that it “clearly indicated that both the OR [Official Record] of eligibility data and the Summary(ies) provided were subject to change.”<sup>186</sup> I agree with NOI that this informed applicants for QS that the Quota Share they eventually

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<sup>182</sup> Email from Jessica Gharrett to Tracy Buck; email from Tracy Buck to Jessica Gharrett; email from Tracy Buck to Jessica Gharrett. The first two emails in the email chain are not dated. The last one is dated May 18, 2009. Tracy Buck is identified as RAM Permits Supervisor. Letter from Acting RAM Program Administrator to Managing Member (Feb. 7, 2008).

<sup>183</sup> IAD at 2, note 2.

<sup>184</sup> IAD at 2.

<sup>185</sup> IAD 3 – 4.

<sup>186</sup> NMFS Response at 3.

received might be different from the Summary because of QS that other applicants might receive during the initial issuance phase of crab QS.<sup>187</sup>

I do not base my conclusion that NMFS can revoke QS that it issued in error because NMFS individually notified each QS holder that NMFS might do that through the Official Record Summaries or any other document. I base my conclusion on the sound legal principle that the power to issue a license presumptively includes the power to revoke the license and that this principle applies to crab QS which, by regulation and statute, is defined as a revocable fishing privilege.

RAM stated that the NOI President should have corrected the Summary of Official Record and that he knew, or should have known, he was getting QS to which he was not entitled.<sup>188</sup> RAM also stated that the NOI President could have, and should have, informed the Bankruptcy Trustee and PG Alaska.<sup>189</sup>

I am not basing my decision on what the NOI President knew, or should have known, or on what he did, or did not, tell PG Alaska. If I were going to rely on those facts, NOI is correct that I should hold a hearing. That would be in the nature of a permit sanction under section 308 of the Magnuson-Stevens Act, namely revoking the permit because the permit holder did something bad.<sup>190</sup> I am not upholding this revocation because the NOI did something bad. I am upholding this revocation because NOI did not ever meet the requirements to receive this QS.

#### **D. NOI is not entitled to any additional information from NMFS.**

With respect to NOI's motion for reconsideration of my order denying NOI's motion for additional documents, I deny it because I have concluded that the written record is sufficient to decide the merits of this appeal and because there are no genuine and substantial issues of adjudicative fact for resolution at a hearing.

As an appellate officer, I have the obligation to oversee an appeals process which provides NOI with notice and opportunity to be heard. NOI has had clear, consistent notice of the reason why NMFS believes that revocation is required. NOI has had opportunity to contest those reasons and present evidence and argument in support of its appeal.

NOI received the documents relating to NOI's participation in the Crab Buyback Program. NOI declared bankruptcy in 2006. The Bankruptcy Trustee has held this QS since that time and has all of its own records of its interaction with NMFS. NOI was provided RAM's complete file. RAM's file begins with NOI's initial QS application and contains RAM's interactions with the

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<sup>187</sup> NOI Reply Memorandum at 3.

<sup>188</sup> NMFS Response at 3.

<sup>189</sup> NMFS Response at 7.

<sup>190</sup> Section 308(g) of the Magnuson-Stevens Act, 16 U.S.C. § 1858(g). A permit may be revoked, or suspended, if a vessel has been used in the commission of an act prohibited under section 307 of the Act or the owner or operator of a vessel has acted in violation of section 307 of the Act.

Bankruptcy Trustee, Managing Member of PGA, and the attorney who complained. NOI was also provided with a supplemental calculation by RAM concerning its division of QS in the only BSAI crab fishery where the F/V ST. MATTHEW made qualifying landings before it sank. But, as an appellate officer, I also have an obligation to decide the appeal when the record is sufficient to issue a decision on the merits of the appeal. I therefore do that now.

#### CONCLUSIONS OF LAW

1. NMFS committed error by issuing crab Quota Share to NOI that was based on the fishing history of the F/V NORTHERN ORION.
2. NMFS has the authority to revoke crab Quota Share if it gives the QS permit holder notice and opportunity to be heard on the proposed revocation.
3. NMFS has the authority to revoke the subject QS even though NMFS issued it in 2005.
4. NMFS should not be estopped from revoking crab Quota Share that it issued in error to NOI.
5. RAM acted to revoke QS within a reasonable time after learning of its potential error in issuing QS to NOI.
6. RAM did not commit affirmative misconduct.
7. Estoppel is not necessary to prevent serious injustice.
8. Estoppel would unduly damage the public interest.
9. The record is sufficient to render a decision on the merits of this appeal as required by 50 C.F.R. § 679.43(g)(2).
10. The appeal does not meet the requirements for an oral hearing in 50 C.F.R. 679.43(g)(3) because there are no genuine and substantial issues of adjudicative fact for resolution at a hearing.
11. Appellant is not entitled to receive additional material from NMFS.

12. The following units of crab QS that are currently held by NOI should be revoked:

<b>BSAI Crab Fishery</b>	<b>Region</b>	<b>QS Units</b>
Bristol Bay red king crab (BBR)	North	49,078
Bristol Bay red king crab (BBR)	South	1,875,610
Bering Sea snow crab (BSS)	North	2,978,830
Bering Sea snow crab (BSS)	South	3,359,106
Eastern Bering Sea Tanner crab (EBT)	Undesignated	338,416
Pribilof red and blue king crab (PIK)	North	32,341
St. Matthew blue king crab (SMB)	North	222,045
St. Matthew blue king crab (SMB)	South	61,357
Western Bering Sea Tanner crab (WBT)	Undesignated	338,270
<b>TOTAL UNITS TO BE REVOKED</b>		<b>9,270,740</b>

#### DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This decision takes effect on August 31, 2011, unless by that date the Regional Administrator orders review of the Decision.

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 Standard Time, on the tenth day after the date of this Decision, August 11, 2011.<sup>191</sup> 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 administrative judge, and must be accompanied by a written statement of 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  
Administrative Judge

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<sup>191</sup> The procedure for filing a motion for reconsideration is on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>.