

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 01-0031
)	
THOMAS C. FALK,)	DECISION
Appellant)	
_____)	May 11, 2007

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) that denied Thomas Falk's application for additional halibut and sablefish Quota Share (QS) under the Pacific Halibut and Sablefish Individual Fishing Quota (IFQ) program, based on a claimed lease of the F/V MASONIC during 1984. Mr. Falk's interests are directly and adversely affected by the IAD. A telephonic hearing was held to determine whether Mr. Falk leased the F/V MASONIC. Mr. Falk testified at the hearing.

ISSUES

1. Did Mr. Falk file a timely claim and appeal for additional halibut and sablefish QS based on the lease of the F/V MASONIC in 1984?
2. Does Mr. Falk qualify for additional halibut and sablefish QS based on the lease of the F/V MASONIC in 1984?

SUMMARY

Mr. Falk filed a timely claim and appeal, but he did not submit a credible lease affidavit or other sufficient evidence to establish that he leased the F/V MASONIC during 1984. I conclude that Mr. Falk does not qualify for additional halibut and sablefish QS based on his claimed lease.

ANALYSIS

1. Did Mr. Falk file a timely claim and appeal for additional halibut and sablefish QS based on the lease of the F/V MASONIC in 1984?

In a number of Decisions,¹ this Office has ruled that an applicant's claim for QS is entitled to be considered on appeal, as long as the claim was timely made during the application period and was timely appealed.

¹ See, e.g., *Tiger, Inc.*, Appeal No. 95-0100 (Nov. 17, 1995); *Richard A. Newby*, Appeal No. 03-0025 (Apr. 26, 2004).

A. The timeliness of Mr. Falk's claim for additional QS

When an applicant submits a separate document with an application for QS, it may be reasonably presumed that the applicant intended for the information in the document to be included as part of the application.² If an applicant's claim for QS conflicts with the information in the official IFQ record, the IFQ regulations require RAM to notify the applicant that a problem exists with the applicant's claim for QS, and to give the applicant 90 days to correct the problem with sufficient documentation. The applicable regulation provides:

(7) Insufficient documentation

Halibut and sablefish catch history, vessel ownership or lease data, and other information supplied by an applicant will be compared with data compiled by the Regional Administrator. If additional data presented in an application are not consistent with the data compiled by the Regional Administrator, the applicant will be notified of insufficient documentation. The applicant will have 90 days to submit corroborating documents . . . in support of his/her application or to resubmit a revised application. All applicants will be limited to one opportunity to provide corroborating documentation or a revised application in response to notification of insufficient documentation.³

One day before the July 15, 1994, filing deadline, Mr. Falk submitted a signed lease affidavit form to RAM with his Application for QS. In the affidavit he asserted that he had leased the F/V MASONIC from his father, Colvin Falk, between May 5, 1984, and September 1984. I conclude that in doing so, Mr. Falk made a timely claim for additional QS based on the lease of the F/V MASONIC in 1984.

In mid-November 1994,⁴ RAM issued halibut and sablefish QS to Mr. Falk based on his ownership of two vessels: the F/V ARGO and the F/V PIONEER.⁵ RAM did not issue additional halibut or sablefish QS to Mr. Falk based on the F/V MASONIC. Sixteen months later, Mr. Falk inquired about his claim for QS based on that vessel.⁶ RAM told him over the telephone (on April 4, 1996) that he needed to produce state fish tickets to substantiate his

² *Vasily P. Reutov*, Appeal No. 95-0139 at 4 (Feb. 27, 1997), in which a claim made on a bill of sale was considered part of the Application for QS.

³ 50 C.F.R. § 679.20(a)(7).

⁴ RAM does not know the exact date that it issued halibut QS and sablefish QS to Mr. Falk, but estimates that it was in mid-November 1994. [IAD at 2, footnote 1]

⁵ QS Data Summary for Mr. Falk.

⁶ Letter to RAM from Mr. Falk (Mar. 12, 1996).

claim.⁷ Five years later (on June 25, 2001), Mr. Falk produced records from the International Pacific Halibut Commission for halibut landings made by the F/V MASONIC from 1975 through 1984. Mr. Falk explained that the reason for the “6 year delay” was due to a “difficult divorce.”⁸

RAM determined that Mr. Falk could not qualify for additional QS based on the lease of the F/V MASONIC because he had “abandoned” his claim by waiting too long (16 months) to “follow up” on his claim and by waiting too long (close to six years) to submit evidence in support of it.⁹

The IFQ regulations do not require an applicant for QS to restate a timely claim for QS in order to have evidence of the claim considered on appeal.¹⁰ Nor do the IFQ regulations specifically provide for the abandonment of a timely claim for QS. We have said however that a timely claim can be “abandoned” based on an affirmative representation by an applicant for QS.¹¹ In *Richard A. Newby*,¹² we concluded that the applicant had not abandoned his original claim for sablefish QS, and did not have to renew his claim to have it considered on appeal, even though he did not inquire about his claim until more than nine years later.

Mr. Falk never told RAM that he abandoned his claim for QS based on the lease of the F/V MASONIC. I conclude that Mr. Falk did not abandon his timely claim for additional QS based on the lease of the F/V MASONIC and that evidence in support of his claim can be considered on appeal as long as he can establish that he made a timely appeal of his claim.

B. The timeliness of Mr. Falk’s appeal

The IFQ regulations provide that “[a]ny person whose interest is directly and adversely affected by an IAD may file a written appeal.”¹³ To be considered timely, the appeal must be filed within 60 days after the issuance of the IAD.¹⁴ An IAD (for purposes of this case) is a finding by

⁷ See the handwritten notation by RAM permit assistant, Clydina Bailey, to a March 12, 1996, letter from Mr. Falk which reads: “4/4/96 Applicant need[s] to provide fish ticket to show 84 landings[,] CB.”

⁸ Letter to Phil Smith (RAM) from Mr. Falk (June 20, 2001).

⁹ IAD at 9.

¹⁰ *Tiger, Inc.*, Appeal No. 95-0100 (Nov. 17, 1995).

¹¹ See, e.g., *Matt Shadle*, Appeal No. 95-0144 at 2 (Jan. 26, 1999).

¹² Appeal No. 03-0025 (Apr. 26, 2004).

¹³ 50 C.F.R. § 679.43(b).

¹⁴ 50 C.F.R. § 679.43(c).

NMFS staff on the eligibility for, and the transfer and use of, QS and IFQ under the IFQ program.¹⁵ Initial Administrative Determinations are made after “evaluating all evidence provided by applicants, comparing that evidence with the data in the official record, and making a determination based on that comparison.”¹⁶

In *Tiger, Inc.*,¹⁷ we ruled that the issuance of QS is the equivalent of a formal written IAD for purposes of filing a timely appeal. In that case, before QS was issued, RAM sent the applicant a QS Data Summary that listed the critical information that RAM had used in determining the applicant’s QS. The applicant was told that it could rebut any information in the summary that it disagreed with by submitting sufficient documentation within 90 days.¹⁸

In this case, RAM sent a QS Data Summary to Mr. Falk at about the same time that RAM issued QS to him.¹⁹ The Data Summary stated that Mr. Falk had qualifying pounds of halibut and sablefish QS based on the F/V ARGO and FV PIONEER, but it said nothing about the F/V MASONIC. There is no evidence that RAM notified Mr. Falk, before issuing QS to him, that his claim for QS based on the F/V MASONIC was inconsistent with the official IFQ record, and that he could correct the problem only by submitting sufficient documentation within 90 days. There is also no evidence that RAM ever told Mr. Falk that he had 90 days to produce sufficient documentation when he telephoned about his claim for QS based on the F/V MASONIC. After the 90 days, RAM could have issued a written IAD with respect to his claim for QS, but RAM did not do so until October 12, 2001, nearly 6 years after the telephone call.

Based on the language of IFQ regulations, an IAD cannot be issued properly without first giving an applicant an opportunity to correct the official IFQ record with sufficient documentation and without telling the applicant that the applicant has only 90 days to do so.²⁰ I conclude that the issuance of QS to Mr. Falk, and the telephone conversation between him and RAM, cannot be considered an “IAD” for purposes of filing a timely appeal for additional QS based on the lease of the F/V MASONIC.

Mr. Falk filed an appeal of his claim for QS based on the F/V MASONIC within 60 days of the written IAD. I conclude that Mr. Falk filed a timely appeal of his claim for additional halibut

¹⁵ Final Rule, 59 Fed. Reg. 28,281 (June 1, 1994).

¹⁶ *Id.*

¹⁷ Appeal No. 95-0100 (Nov. 17, 1995).

¹⁸ The applicant, Tiger, Inc., claimed on its Request for Application (RFA) for QS that it owned the F/V SILVER ICE as of March 16, 1988, but the QS Data Summary for Tiger, Inc., showed that it owned the vessel as of April 2, 1990.

¹⁹ The QS Data Summary was issued on November 14, 1994.

²⁰ 50 C.F.R. § 679.40(a)(7).

and sablefish QS based on the lease of the F/V MASONIC in 1984.

2. Does Mr. Falk qualify for additional halibut and sablefish QS based on a lease of the F/V MASONIC in 1984?

A qualified person for halibut QS is entitled to additional halibut QS based on the lease of a vessel,²¹ as long as the halibut landings for the QS were part of the person's highest total legal landings of halibut during any five of seven years between 1984 and 1990.²² The halibut landings made by the F/V MASONIC in 1984 were part of Mr. Falk's highest total legal landings of halibut for five of seven years between 1984 and 1990. Therefore, Mr. Falk can qualify for additional halibut QS if he can establish that he leased the F/V MASONIC during 1984.

A qualified person for sablefish QS is entitled to sablefish QS based on the lease of a vessel,²³ as long as the sablefish landings for the QS were part of the person's highest total legal landings of sablefish during any five of six years between 1985 and 1990.²⁴ The sablefish landings made by the F/V MASONIC in 1984 cannot be part of Mr. Falk's highest total legal landings of sablefish for five of six years between 1985 and 1990. Therefore, Mr. Falk cannot qualify for additional sablefish QS even if he can establish that he leased the F/V MASONIC during 1984.

A. The lease affidavit for the F/V MASONIC

The IFQ regulations provide that a written lease or notarized statement from the vessel owner and lease holder which attests to the existence of a vessel lease agreement at any time during the QS qualifying years²⁵ is considered conclusive evidence of a vessel lease, as long as the notarized statement identifies the leased vessel and indicates the name of the lease holder and the period of time during which the lease was in effect.²⁶

²¹ 50 C.F.R § 679.40(a)(2)(i)(B).

²² 50 C.F.R § 679.40(a)(4)(i).

²³ 50 C.F.R § 679.40(a)(2)(i)(B).

²⁴ 50 C.F.R § 679.40 (a)(4)(ii).

²⁵ RAM 's practice is to consider the term "QS qualifying years" to include a QS base year (which are years 1984-1987 for halibut QS), for purposes of determining whether an affidavit is conclusive evidence of a vessel lease. See the electronic mail from Jessica Gharrett (RAM) to Randall Moen (Aug. 5, 2002); and the electronic mail from Phil Smith (RAM) to Edward Hein (Aug. 7, 2002).

²⁶ 50 C.F.R. § 679.40(a)(3)(iii).

In *Thomas W. Mittenen*,²⁷ this Office ruled that a lease affidavit cannot be considered conclusive evidence of a vessel lease if the evidence in the record shows that the affidavit is not truthful or credible. In that case, we said:²⁸

When an affidavit on its face satisfies the regulatory requirements of a vessel lease, the affidavit is considered conclusive evidence of a vessel lease. This assumes, however, that the affidavit is credible. Where evidence in the record is inconsistent with an affidavit, an appeals officer should not accept the affidavit on its face, and should look beyond the four corners of the document to determine whether the affidavit is credible. If, after considering all of the evidence, the appeals officer finds that the affidavit is not truthful or credible, the affidavit will not be accepted as conclusive evidence.

We made the ruling in that case because several key pieces of evidence in the record conflicted with the representations made in the affidavit. The nature of the circumstances surrounding the signing of the lease affidavit also contributed to our finding that the affidavit was not credible. The vessel owner had missed the filing deadline for QS, and had nothing to lose, and (perhaps) something to gain, by signing the lease affidavit. After considering all of the evidence in the record, we found that the lease affidavit was not credible, and concluded that the lease affidavit could not be considered conclusive evidence of a vessel lease.

In this case, Mr. Falk did not produce a written lease for the lease of the F/V MASONIC. However, he did produce an affidavit of a written lease in which he asserts that he leased the F/V MASONIC from his father in 1984. On its face, the affidavit does not satisfy all of the factual regulatory requirements for conclusive evidence of a vessel lease. The affidavit is notarized and signed by the parties to the lease, Mr. Falk, and his father, Colvin Falk, the vessel's owner. It attests to the existence of a lease agreement during the period of May 5, 1984, through September 1984. However, the affidavit does not properly identify the F/V MASONIC as the vessel leased by the claimed lessee, Mr. Thomas Falk. The ADF&G vessel registration number for the vessel on the affidavit is 06936, but the correct ADF&G number is 33468.²⁹

There are other reasons to doubt the affidavit's truthfulness or credibility. The vessel's owner, Colvin Falk, did not apply for halibut or sablefish QS.³⁰ Therefore, he had nothing to lose and something to gain for his son by signing the lease affidavit. He was also on board the F/V

²⁷ Appeal No. 96-0002 (Jan. 22, 1999).

²⁸ *Id.*, at 6.

²⁹ IAD at 10.

³⁰ Electronic mail from Tracy Buck (RAM) to Ed Hein (Office of Administrative Appeals), (Jan. 24, 2003).

MASONIC as captain³¹ and fisherman³² for at least two of the vessel's three halibut landings during the claimed lease period: May 27, 1984, and August 15, 1984. Therefore, Colvin Falk would not have had a reason to lease the F/V MASONIC to his son (at least for the May 27 and August 15 landings). Under those circumstances, it seems highly unlikely that Colvin Falk would have leased the F/V MASONIC during the period of time claimed in the lease affidavit. I find, therefore, that the lease affidavit should not be accepted at face value, and I conclude that it does not constitute conclusive evidence of a lease.

B. Other evidence of a vessel lease

The IFQ regulations provide for other evidence, which may not be conclusive but may support a vessel lease, to determine the existence of a vessel lease.³³

Neither the IFQ regulations, nor the regulatory history of the LLP regulations, define "vessel lease." In a series of decisions,³⁴ this Office identified seven factors to assist Administrative Judges to determine the existence of an oral lease. The factors are:

- (1) how the parties characterized their business arrangement at the relevant times;
- (2) whether and to what extent the claimed lessee had possession and command of the vessel and control of the navigation of the vessel;
- (3) whether the claimed lessee directed the fishing operations of the vessel;
- (4) whether the claimed lessee had the right to hire, fire, and pay the crew of the vessel;
- (5) whether the claimed lessee was responsible for the operating expenses of the vessel;
- (6) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her business for federal income tax and other purposes; and

³¹ International Pacific Halibut Commission fishing history records for the F/V MASONIC, May, 1984.

³² State of Alaska Department of Fish and Game's fishing history for the F/V MASONIC during 1984.

³³ 50 C.F.R. § 679.40(a)(3)(iii).

³⁴ See, e.g., *O'Rourke v. Riddle*, Appeal No. 95-0018 (May 18, 1995); *F/V Determined Partnership v. Big Blue, Inc.*, Appeal No. 95-0049 (Oct. 22, 1996); *Smee v. Echo Belle, Inc.*, Appeal No. 95-0076 (Aug. 1, 1996); *Kristovich v. Dell*, Appeal No. 95-0010 (Mar. 20, 1996).

(7) whether the claimed lease had a set or guaranteed term.

We developed these factors after reviewing the regulatory history of the IFQ program, maritime law, and other legal principles relating to vessel leases. The North Pacific Fishery Management Council intended to award QS to vessel lessees because, like vessel owners, lessees “supply the means to harvest fish, suffer the financial and liability risks to do so, and direct the fishing operations.”³⁵ In our first decision involving a vessel lease issue,³⁶ we said:

it appears that the Council intended to allocate Quota Share to those who acted like entrepreneurs in controlling and directing the fishing operations that produced the legal landings in question. An entrepreneur is one who organizes, operates, and assumes the risk in a business venture in expectation of gaining the profit.³⁷ This is the kind of person the Council seems to have had in mind when it decided that vessel lessees, as well as vessel owners, could be “qualified persons.” The RAM Division, too, appears to have envisioned a lessee as one who was an entrepreneur with respect to the fishing operations.

In applying the oral lease factors, we have found it necessary to use a flexible case-by-case analysis. The factors are analytical tools or guideposts, rather than elements of a vessel lease. The factors are not exclusive. An Administrative Judge has discretion to consider additional factors in particular cases if they help in determining whether a lease existed between the parties.

I shall now discuss whether the evidence shows that Mr. Falk held an oral lease of the F/V MASONIC from his father, Colvin Falk, during 1984.

(1) How the parties characterized their business arrangement at relevant times.

During the hearing, Mr. Falk testified that he and his father, Colvin Falk, agreed to the lease of the F/V MASONIC before his father left for Norway and that the lease lasted for the period claimed in the lease affidavit: between May 5, 1984, and September 30, 1984.

The evidence on appeal shows that the F/V MASONIC made a total of six halibut or sablefish landings during the claimed lease period. The NMFS official IFQ record shows that the F/V MASONIC made three sablefish landings on June 26, July 9, and August 15; and one halibut landing on May 27. The International Pacific Halibut Commission’s records show that the F/V MASONIC made two additional halibut landings (on Washington state fish tickets) on June 4, and August 30. Colvin Falk’s passport shows that he was in Norway between June 25, 1984, and July 21, 1984.

³⁵ 58 Fed. Reg. 59,375, at 59,378 (Nov. 9, 1993).

³⁶ *O’Rourke v. Riddle*, Appeal No. 95-0018 at 13 (May 18, 1995).

³⁷ Webster’s II New Riverside University Dictionary 436 (1988).

Mr. Falk testified that the terms of the lease required him to “take on all of the responsibilities to run the boat and catch the fish.” To “run” a vessel can refer to both a claimed lease and a hired skipper arrangement. Therefore, Mr. Falk’s testimony regarding the terms of the vessel lease does not shed light on whether arrangement between him and his father was a lease or a hired skipper agreement.

The record on appeal does not contain a document written before, during, or just after the claimed lease period that shows how the parties characterized their business arrangement. While the lease affidavit attests to the existence of a vessel lease, it is signed by the Appellant’s father, who had nothing to lose and perhaps something to gain for his son by signing the affidavit. The lease affidavit was also signed several years after the claimed lease period, on May 5, 1994, just prior to the deadline for submitting an application for QS under the IFQ program. The lease affidavit was signed not for the purpose of establishing the terms of their arrangement between themselves, but for obtaining additional QS. Therefore the affidavit’s representations would not constitute a characterization of the business arrangement at a relevant time.

There is simply not enough contemporaneous evidence to ascertain how the parties characterized their business arrangement during the claimed lease period. I find that the parties did not characterize their business arrangement for the F/V MASONIC as a “lease” at relevant times.

(2) Whether and to what extent the claimed lessee had possession and command of the vessel and control of the navigation of the vessel.

Mr. Falk testified that he captained the F/V MASONIC during the whole claimed lease period, but there is substantial evidence that shows otherwise. The fish tickets for the vessel’s May 27, 1984, and August 15, 1984, landings show that Colvin Falk was the fisherman and holder of the commercial fishing permit for those fishing trips. It would be highly unusual for a vessel owner to relinquish control while fishing aboard the owner’s vessel. A copy of the International Pacific Halibut Commission’s vessel license application for the F/V MASONIC additionally shows Colvin Falk as the vessel’s captain in 1984. Therefore, it is likely that Colvin Falk was the vessel’s captain for the vessel’s May 27, June 4, and August 30 halibut landings in 1984. The International Pacific Halibut Commission’s log sheets for the F/V MASONIC’s halibut landing on August 30, 1984, specifically show Colvin Falk as the vessel’s captain.

The documents in the record do not substantiate that Mr. Thomas Falk was in charge of the F/V MASONIC during the claimed lease period. Therefore, I find that Mr. Falk was not in command of the vessel and in control of the navigation of the vessel during the claimed lease period.

(3) Whether the claimed lessee directed the fishing operations of the vessel.

Mr. Falk testified that he was in charge of the fishing operations of the F/V MASONIC during the claimed lease period. In spite of this, the fish tickets for the vessel’s May 27, 1984, and August 15, 1984, landings show that Colvin Falk was the fisherman and holder of the commercial fishing permit for those fishing trips. The record also indicates that Mr. Thomas

Falk did not have a State of Alaska commercial fishing permit during the period of the claimed lease period.³⁸ I therefore find that Mr. Falk did not direct the fishing operations of the vessel during the claimed lease period.

(4) Whether the claimed lessee had the right to hire, fire, and pay the crew of the vessel.

Mr. Falk's testimony is the only evidence in the record that he had the right to hire, fire, and pay the crew of the vessel during the claimed lease period. Given that his father, the owner, was aboard the F/V MASONIC during at least two of the vessel's fishing trips, I find that Mr. Falk did not have the right to hire, fire, and pay the crew of the vessel during the claimed lease period.

(5) Whether the claimed lessee was responsible for the operating expenses of the vessel.

Mr. Falk testified that he was responsible for all operating expenses of the F/V MASONIC during 1984. He admits that he did not use his own fishing gear, but states that he was required to replace all lost and condemned gear during the claimed lease period. Mr. Falk states that he used the vessel's name to purchase materials and supplies necessary for the halibut trips. The only receipts that Mr. Falk produced for the vessel's trip expenses are a fuel invoice, and a credit card statement, for the month of August 1984, which show the expenses were charged in the F/V MASONIC's name and therefore presumably paid for by Mr. Falk's father.³⁹ Mr. Falk testified that even though he used the vessel's name, he was ultimately responsible for the vessel's expenses in the event of a "hole" operation. Mr. Falk did not produce any documents that show he paid for or assumed ultimate responsibility for the expenses of the F/V MASONIC during 1984. I find that Mr. Falk did not bear the financial risk for the fishing trips of the F/V MASONIC during the claimed lease period.

(6) Whether the claimed lessee treated the fishing operations in which the vessel was used as his/her business for federal income tax and other purposes.

Mr. Falk has submitted no proof, other than his testimony, that he treated the fishing operations as his business during the claimed lease period. Mr. Falk testified that during the claimed the lease period he paid the trip expenses, and received the gross revenues, from the vessel's fishing operations; that he paid for the vessel's liability insurance; and that he paid his father (32 ½ percent of gross revenues) for the lease of the vessel. Mr. Falk did not produce a check, receipt, or settlement sheet to prove that he did. Nor did he produce a copy of a bank statement or a copy of his 1984 Federal tax return (Schedule C) to show that he paid for the rent and liability insurance of the F/V MASONIC, and treated the fishing operations as his business. I find that

³⁸ Electronic mail from Nancy Free Sloan (State of Alaska Commercial Fisheries Entry Commission) to Tracy Buck (RAM) (July 31, 2001).

³⁹ Harbor Fuel Service receipt of fuel charged to the F/V MASONIC, by Tom Falk, as customer, August 17, 1984; and the Chevron credit card receipt of Colvin Falk, signed by Tom Falk, for the fuel charged to the F/V MASONIC on August 17, 1984.

Mr. Falk did not treat the fishing operations of the F/V MASONIC as his own business during the claimed lease period in 1984.

(7) Whether the claimed lease had a set or guaranteed term.

During the hearing, when I asked Mr. Falk why he believes that he held a lease the F/V MASONIC, he testified that he “leased” the F/V MASONIC because he had taken “on all of the responsibilities to run the vessel” during the time his father was in Norway. After I told him that the F/V MASONIC did not make any halibut landings during the time his father was in Norway, and that he therefore could not get additional QS based on the lease of the vessel during that period, Mr. Falk stated that he had leased the F/V MASONIC during the whole period claimed in the lease affidavit.

Mr. Falk’s testimony raises an important question: what period of time did Mr. Falk and his father agree to for the “lease” the F/V MASONIC? Was it for when his father was in Norway or was it for the claimed lease period in the lease affidavit? In either case, the time periods claimed by Mr. Falk casts serious doubt on whether the claimed lease had a set or guaranteed term, and on the value or existence of the claimed lease. The F/V MASONIC did not make halibut landings when Mr. Falk’s father was in Norway, and Mr. Falk’s father was in charge of the vessel and its fishing operations for at least part of the claimed lease period. I find that the claimed lease did not have a set or guaranteed term.

Conclusion of Oral Lease Analysis

Mr. Falk does not have sufficient evidence to prove by a preponderance that he leased the F/V MASONIC from his father during 1984.

The evidence in the record shows that Mr. Falk could have been a crew member, hired skipper, or possibly a business partner at any time during the claimed lease period. The only time that Mr. Falk possibly could have “leased” the F/V MASONIC would have been when his father was in Norway. But the F/V MASONIC did not make halibut landings during that time. Mr. Falk’s only proof that he leased the vessel during the claimed lease period, other than his own assertions, is a Washington state fish ticket for halibut landings on August 30, 1984, that he signed as the fisherman; and the lease affidavit that he and his father signed. That evidence by itself is insufficient evidence of a vessel lease. Mr. Falk did not establish that he and his father characterized their business arrangement as a lease during the period of the claimed lease. Nor did he establish that he assumed the financial risks of the vessel’s operations, treated the vessel’s fishing operations as his own business, and was in charge of the F/V MASONIC and its fishing operations during the claimed lease period.

Based on the preponderance of evidence, I conclude that Mr. Falk did not lease the F/V MASONIC in 1984 and that he therefore does not qualify for additional QS.

FINDINGS OF FACT

I find by a preponderance of the evidence in the record that:

1. Mr. Falk submitted a signed lease affidavit form to RAM with his Application for QS in which he asserted that he leased the F/V MASONIC during 1984.
2. Mr. Falk never told RAM that he had abandoned his claim for QS based on the lease of the F/V MASONIC.
3. RAM did not notify Mr. Falk that his claim for QS based on the F/V MASONIC was insufficient, and it not give him 90 days to corroborate his claim with sufficient documentation, before the issuance of QS.
4. Mr. Falk filed an appeal of his claim for QS based on the lease of the F/V MASONIC, within 60 days of a formal written IAD.
5. The halibut landings made by the F/V MASONIC in 1984 were part of Mr. Falk's highest total legal landings of halibut for five of seven years between 1984 and 1990.
6. The sablefish landings made by the F/V MASONIC in 1984 cannot be part of Mr. Falk's highest total legal landings of sablefish for five of six years between 1985 and 1990.
7. Mr. Falk's lease affidavit for the F/V MASONIC in 1984 does not satisfy the factual regulatory requirements for conclusive evidence of a vessel lease.
8. The lease affidavit of the F/V MASONIC is not credible evidence of a vessel lease between Mr. Falk and his father, Colvin Falk, in 1984.
9. Mr. Falk did not produce sufficient evidence that he leased the F/V MASONIC from his father during 1984.

CONCLUSIONS OF LAW

1. Mr. Falk made a timely claim for QS based on the lease of the F/V MASONIC in 1984, when he submitted a lease affidavit for the vessel with his Application for QS.
2. Mr. Falk did not abandon his timely claim for additional QS based on the lease of the F/V MASONIC.
3. Mr. Falk's claim for additional QS based on the lease of the F/V MASONIC can be considered on appeal as long as it can be established that he made a timely appeal of his claim.
4. An IAD cannot be issued properly without first giving an applicant an opportunity to correct the official IFQ record with sufficient documentation and without telling the applicant that the applicant has only 90 days to do so.

5. The issuance of QS to Mr. Falk, and the telephone conversation between him and RAM in this case, cannot be considered an “IAD” for purposes of filing a timely appeal for additional QS based on the lease of the F/V MASONIC.
6. Mr. Falk filed a timely appeal of his claim for additional halibut QS based on the lease of the F/V MASONIC in 1984.
7. The lease affidavit between Mr. Falk and his father, Colvin Falk, for the F/V MASONIC in 1984, cannot be considered conclusive evidence of a vessel lease.
10. Mr. Falk did not lease the F/V MASONIC in 1984.
11. Mr. Falk does not qualify for additional QS based on the lease of the F/V MASONIC.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on June 11, 2007, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. §679.43(o).

The Appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska Time, on May 21, 2007, the tenth day after this Decision. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Administrative Judge, and must be accompanied by a written statement in support of the motion.

Randall J. Moen
Administrative Judge