

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 95-0011
)	
WAYNE B. BROWN,)	DECISION
Appellant)	
_____)	June 23, 1998

STATEMENT OF THE CASE

Appellant Wayne Brown filed a timely appeal of an Initial Administrative Determination [IAD] of the Restricted Access Management program¹ [RAM] dated March 6, 1995. The IAD denied Mr. Brown's application for Quota Share [QS] under the Individual Fishing Quota [IFQ] Program for Pacific halibut and sablefish because his Request for Application [RFA] was not filed by the July 15, 1994, deadline. Mr. Brown has adequately shown that his interest is directly and adversely affected by the IAD. Because the facts are not in dispute, no hearing was ordered.²

ISSUE

Whether Mr. Brown's application was timely filed.

BACKGROUND

In August 1993, Mr. Brown's wife left him, causing him to undergo treatment for depression from September 1993, until his wife's return in April 1994.³ The application period for filing an RFA under the IFQ program was from January 17, 1994, until July 15, 1994. RAM received Mr. Brown's RFA on February 14, 1995, seven months after the filing deadline. Mr. Brown states that he did not send in an RFA by the deadline because he was "in the middle of a divorce" and the RFA got "lost in the paper shuffle."⁴

¹The Restricted Access Management Division was renamed Restricted Access Management Program, effective September 28,

²*See*, 50 C.F.R. § 679.43(g), formerly 50 C.F.R. § 676.25(g). All IFQ regulations were renumbered, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1996). The wording of the regulation in question was unchanged by the renumbering.

³*See*, Mr. Brown's statement of appeal, dated March 8, 1995.

⁴*See*, Mr. Brown's letter to the Division, dated February 2, 1995.

On March 6, 1995, Mr. Brown's RFA was rejected by RAM as untimely. RAM's records also show no landings of halibut or sablefish were made from any vessel owned or leased by Mr. Brown during the QS qualifying period (1988, 1989, or 1990).⁵

DISCUSSION

Under the regulations of the IFQ program, an application for QS must be filed with RAM before the close of business on July 15, 1994.⁶ An application for QS received after that date will not be considered.⁷ To be considered timely filed, the application for QS must have been mailed or postmarked before July 15, 1994.⁸ An RFA is the equivalent of an application for QS for purposes of meeting the filing deadline.⁹ To qualify for QS, an applicant must have made legal landings halibut and sablefish during the QS qualifying period: 1988, 1989, or 1990.¹⁰

Mr. Brown asks that he be excused from the deadline of filing an RFA because he was in the middle of a divorce during the application filing period. He states that he was treated for depression until his wife's return in April 1994. Unfortunately, nothing in the IFQ regulations or elsewhere authorizes me or the National Marine Fisheries Service to accept a late application (or RFA) as timely filed, unless there is a basis for equitably tolling¹¹ the filing deadline.

To the extent that depression and marital discord could be considered suitable grounds for tolling the application deadline, I find that neither apply in this instance because his formal treatment ended and his wife returned to the marriage nearly three months *before* the application deadline. Mr. Brown had ample time to file an RFA in a timely manner, but did not do so. Consequently, I conclude that Mr. Brown's application for QS (RFA) was not timely filed. Because Mr. Brown's RFA was not timely filed, there is no need to discuss whether he would have qualified for QS in the absence of evidence of

⁵The landings information was obtained on April 22, 1997, from Ms. Tracy Buck, a permit specialist with RAM.

⁶ See, 59 Fed. Reg. 701-702 (January 6, 1994).

⁷Id.

⁸See, Michael B. White, Appeal No. 94-0009, January 17, 1989, *aff'd* January 20, 1995.

⁹See, Keith A. Buehner, Appeal No. 94-0001, September 26, 1994, *aff'd* March 2, 1995.

¹⁰See, 50 C.F.R. § 679.40(a)(2); formerly 50 C.F.R. § 676.20(a)(1).

¹¹The Equitable tolling doctrine requires a showing of extraordinary circumstances beyond the applicant's control. See, e.g., John T. Coyne, Appeal No. 95-0012, May 24, 1996, *aff'd* June 24, 1996.

legal landings of halibut or sablefish.

FINDING OF FACT

Mr. Brown's formal treatment for depression ended upon his wife's return to the marriage in April 1994, nearly three months before the expiration of the application deadline.

CONCLUSIONS OF LAW

1. Equitable tolling does not apply in this case.
2. Mr. Brown's application for QS (RFA) was not timely filed.

DISPOSITION

The IAD denying Mr. Brown's eligibility for QS on the basis of an untimely application (RFA) is **AFFIRMED**. This decision takes effect on July 23, 1998, unless, by that date, the Regional Administrator orders review of the Decision.

Any party, including RAM, may submit a Motion for Reconsideration, but it must be received at this office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this decision, July 3, 1998. 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 Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion.

Randall J. Moen
Appeals Officer