

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
)
DENNIS VAN SKY,)
Appellant)
_____)
Appeal No. 95-0012
DECISION
August 9, 1999

STATEMENT OF THE CASE

Dennis Van Sky filed a timely appeal of an Initial Administrative Determination [IAD] issued on February 27, 1995, by the Restricted Access Management [RAM] program.¹ The IAD denied Mr. Van Sky's application for halibut quota share [QS] under the Individual Fishing Quota [IFQ] program because he refused to waive the confidentiality of his fishing records maintained by the state of Alaska and the federal government. On March 10, 1995, Mr. Van Sky appealed the IAD. At the same time, he submitted the signed waiver to RAM.

On March 16, 1995, RAM issued a Reconsideration that vacated the original IAD and acknowledged that Mr. Van Sky was eligible to receive an initial issuance of QS, but advised him that RAM would not issue an IFQ permit to Mr. Van Sky for the 1995 fishing season.²

In response to the issuance of the Reconsideration, we dismissed Mr. Van Sky's appeal on April 26, 1995. Mr. Van Sky filed a second appeal on May 2, 1995, claiming that he was wrongfully denied an IFQ permit for the 1995 fishing season. We, therefore, reopened the appeal on May 9, 1995, and held a telephonic oral hearing on September 12, 1995. Mr. Van Sky was the only witness at the hearing. Mr. Van Sky has adequately shown, as required by 50 C.F.R. § 679.43(b), that his interests are directly and adversely affected by the Reconsideration.

ISSUE

Did RAM wrongfully deprive Mr. Van Sky of an IFQ permit for the 1995 halibut season?

BACKGROUND

¹The Restricted Access Management Division was renamed Restricted Access Management Program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

²A 1995 IFQ permit was not issued for the initial issuance of QS in question. Mr. Van Sky did, however, obtain other QS via transfer and was issued a 1995 IFQ permit for those QS. [Tracy Buck memorandum, 7 Sep 95, Exhibit 1]

The first step in applying for quota shares is for a person to submit a Request for Application for Quota Shares [RFA] form to RAM. The multiple-page form contains at the bottom of each page a statement, to be signed by the applicant, that includes a waiver of the confidentiality of the person's fish harvest records maintained by state and federal governments and authorizing NMFS to use the information in those records to determine the proper allocation of quota shares to eligible applicants. RAM requires each applicant to sign the waiver on the RFA before it will send an application form issue QS to the applicant.

The purpose for obtaining the waiver is to enable RAM to release to applicants any confidential fishing history it may have in the NMFS Official IFQ Record (database) for which the applicant may receive credit under the IFQ program. If RAM released the information without first obtaining the appropriate waiver, it could be in violation of state or federal confidentiality rules.³ Releasing such information enables applicants to determine whether RAM's records accurately reflect the landings history of the applicants' vessels and to give applicants an opportunity to correct the record and, ultimately, receive the appropriate amount and types of QS.

Mr. Van Sky objected to releasing the confidentiality of his fish harvest records, and he informed RAM of his objection. [Van Sky letter, 6 January 94]. RAM responded that it would not prepare an application for him or issue QS to him unless he signed the waiver. [RAM letter, 11 January 94] A few weeks later, on February 3, 1994, RAM received a completed RFA from Mr. Van Sky. He had signed the statement on each page of the form, but had crossed out the waiver language. Included with the RFA was a letter in which Mr. Van Sky reasserted his objection to signing the waiver.

Despite RAM's warning that it would not send an application without first receiving a signed waiver, RAM inadvertently sent him an application for QS on March 14, 1994. RAM had listed on the application the total number of pounds of halibut that its official record showed had been landed from Mr. Van Sky's vessels and which could be credited for IFQ purposes. [Application for Quota Share, Part 3, Quota Share Summary, Total Qualifying Pounds] The application also showed the pound totals for each year from 1988 - 1990, which were labeled "Not Confidential." [Application for Quota Share, Part 3, Work Sheet] Mr. Van Sky signed the application and returned it on July 12, 1994, without objecting to or disagreeing with any of the information contained on the form.

On August 9, 1994, RAM again wrote to Mr. Van Sky and stated that the application he had received had been sent in error, and that RAM still would not issue any QS to him until he signed the waiver on the RFA form. In his appeal, Mr. Van Sky states that he either did not receive this letter or that he disregarded it. [Appeal, ¶2] Six months later, Mr. Van Sky wrote a letter [13 February 95] to RAM inquiring about the status of his QS application. He claimed in the letter that he had phoned RAM

³See, Alaska Stat. § 16.05.815 and 5 U.S.C. § 552a (Privacy Act).

several times and was told, at least once, that "everything was in order and I would be getting my QS with the next batch." He said that he was subsequently told that there was still a problem with his failure to sign the waiver.

RAM responded with an IAD [27 February 95] that denied Mr. Van Sky's application for QS because of his refusal to sign the confidentiality waiver. Mr. Van Sky wrote back [4 March 95] to say that he was shocked by the denial of his QS application and hoped that the matter could still be resolved in his favor. He enclosed three signed waivers with the letter. Also enclosed was an appeal of the IAD, which RAM forwarded to this Office.

On March 16, 1995, RAM reconsidered and vacated the IAD, which had denied Mr. Van Sky's application for QS. In the Reconsideration, RAM stated that the submission of the executed waivers cured the defect in his application. Therefore, RAM "affirmed" Mr. Van Sky's "eligibility to receive QS by initial issuance," but refused to issue an IFQ permit for the 1995 fishing season. The

Reconsideration stated: “ The 1995 Quota Share Pool (QSP) was established on January 31, 1995, and the IFQ poundage for the 1995 season were calculated accordingly. At this point, it is simply too late to include new QS in the pool and to re-calculate the 1995 IFQ amounts.”
[Reconsideration, at 1]

DISCUSSION

The question to be decided in this appeal is whether RAM improperly deprived Mr. Van Sky of a 1995 IFQ permit associated with the halibut QS for which he qualified as an initial issuee. Under 50 C.F.R. § 679.40(c), RAM is required to calculate the annual allocation of IFQ for all QS holders based on the amount of each person's QS, and the amounts in the QS pool for each regulatory area, on record with the NMFS Alaska Region as of noon on January 31 of each year. RAM is then required to issue an IFQ permit to each QS holder, and mail the permit before the start of the annual IFQ fishing season. If a person's permit application is incomplete or improperly completed, RAM must notify the person of the deficiency and may not issue the permit until RAM receives a complete application. 50 C.F.R. § 679.4(a)(1)(ii).

In this instance, RAM treated the crossed-out confidentiality waiver language on Mr. Van Sky's RFA as a deficiency in his application for QS. RAM notified Mr. Van Sky of the problem in the August 9, 1994 letter. Only after receiving the signed waiver in March of 1995 did RAM inform Mr. Van Sky that he was qualified for an initial issuance of halibut QS. Although RAM considered his application complete at that point, RAM did not issue the 1995 IFQ permit because it concluded that it was too

late to include his QS in the 1995 QS pool.

RAM's Official IFQ Record shows, however, that Mr. Van Sky's halibut QS had been awarded and issued, and was on record with the NMFS Alaska Region, on January 31, 1995. [IFQ590 screen printout, Exhibit 2] The Official IFQ Record also shows that a QS certificate for Mr. Van Sky's QS was printed on February 1, 1995. [IFQ780 screen printout, Exhibit 3] Apparently, this certificate was held by RAM and was never mailed to Mr. Van Sky.

According to Jessie Gharrett, RAM's data manager, and Frank Pfeifer, a RAM contractor who developed the IFQ computer system, all QS awarded as of January 31, 1995, would have been included in the 1995 QS pool. [Gharrett memoranda, 27 July 99, Exhibit 4, and 2 Aug 99, Exhibit 5] Therefore, we find that Mr. Van Sky's halibut QS was, in fact, included in the 1995 QS pool. We also find that RAM erred when it determined in the Reconsideration that it could not issue a 1995 IFQ permit to Mr. Van Sky. We conclude that RAM's failure to issue and mail the IFQ permit, after determining that Mr. Van Sky was qualified for an initial issuance of QS and that his application was complete, was in violation of 50 C.F.R. § 679.40(c)(3). Therefore, we conclude that RAM wrongfully deprived Mr. Van Sky of a 1995 IFQ permit.

I note that in this case no purpose was served by RAM's insistence that Mr. Van Sky execute the waiver. Neither the Alaska state confidentiality statute nor the federal Privacy Act require RAM to obtain Mr. Van Sky's waiver in order to release his own landings history information to him. As RAM acknowledged on Mr. Van Sky's application, the landings history released to him was "Not Confidential." Furthermore, no other QS applicant claimed credit for Mr. Van Sky's halibut landings. Thus, RAM did not need his waiver because it did not need to release his landings history to any other applicant. In short, there was no confidentiality problem with respect to Mr. Van Sky's fishing records, so a waiver was not required.⁴

Although 50 C.F.R. § 679.4(a)(1)(ii) prohibits RAM from issuing a permit until the applicant has submitted a properly completed application, that is a questionable basis for delaying issuance of QS or an IFQ permit in a case such as this. First, 50 C.F.R. § 679.4(a)(1)(ii) was not in effect in 1995.⁵ The applicable language in effect at the time RAM was considering Mr. Van Sky's application was at 50 C.F.R. § 676.20(d), which provided in part:

⁴Even if Mr. Van Sky's waiver had been needed to authorize the release of his fishing records to him, once RAM had supplied the information to him on his application, obtaining the waiver was meaningless.

⁵The provision did not take effect until July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1996)

Complete applications received by the Regional Director will be acknowledged. An incomplete application will be returned to the applicant with specific kinds of information identified that are necessary to make it complete.

That language did not, on its face, authorize RAM to deny or delay issuance of QS or of an IFQ permit to a qualified applicant. This is particularly so in light of paragraph (d)(2) of that section, which states:

(2) Uncontested data in applications will be approved by the Regional Director. Based on these data, the Regional Director will calculate each applicant's initial halibut and sablefish QS, as provided in (b) of this section, for each IFQ regulatory area, respectively, and will add each applicant's halibut and sablefish QS for an IFQ regulatory area to the respective QS pool for that area.

Nothing in the language of (d) authorized denial or delay of an applicant's QS or IFQ permit where the uncontested data in the application provided a sufficient basis for calculating and awarding QS and IFQ, as was the case with Mr. Van Sky's application.

A second reason why 50 C.F.R. § 679.4(a)(1)(ii) is a questionable basis for delaying issuance of QS or an IFQ permit in this case is that the waiver appeared on the Request for Application form, not on the application itself. Third, Mr. Van Sky's application was signed and properly completed. Fourth, as RAM knew or should have known by January 31, 1995, Mr. Van Sky's waiver was not needed for processing his application, for implementing the IFQ program, or for complying with state and federal confidentiality law requirements. Finally, RAM has not consistently abided by the requirements of 50 C.F.R. § 679.4(a)(1)(ii); in practice, RAM has issued QS and IFQ permits to applicants who never even returned the applications that were sent to them.

In light of all the above, we conclude that this regulation (and its predecessor) did not authorize RAM to deny or delay issuance of QS or an IFQ permit to a qualified applicant, such as Mr. Van Sky, whose confidentiality waiver is not, in fact, needed, and whose application and RFA are, in all other respects, complete.⁶

We do not decide whether RAM can lawfully require an applicant to execute a confidentiality waiver as a condition to issuance of QS or an IFQ permit where the release of the applicant's confidential fishing history to other applicants could be useful to them and to RAM in processing their applications and implementing the IFQ program.

⁶For that matter, it is questionable whether RAM had the authority to refuse to send a QS application to Mr. Van Sky until he executed the waiver on the RFA. The language of 50 C.F.R. § 679.40(a)(6)(i), and its predecessor 50 C.F.R. § 676.20(d), required the agency to make a QS application form available to any person upon request.

FINDINGS OF FACT

1. Mr. Van Sky's halibut QS was, in fact, included in the 1995 QS pool.
2. RAM erred when it determined in the Reconsideration that it could not issue a 1995 IFQ permit to Mr. Van Sky.

CONCLUSIONS OF LAW

1. RAM's failure to issue and mail the IFQ permit, after determining that Mr. Van Sky was qualified for an initial issuance of QS and that his application was complete, was in violation of 50 C.F.R. § 679.40(c)(3).
2. 50 C.F.R. § 679.4(a)(1)(ii) and 50 C.F.R. § 676.20(d) did not authorize RAM to deny or delay issuance of QS or an IFQ permit to a qualified applicant, such as Mr. Van Sky, whose confidentiality waiver is not, in fact, needed, and whose application and RFA are, in all other respects, complete.
3. RAM wrongfully deprived Mr. Van Sky of a 1995 IFQ permit.

DISPOSITION AND ORDER

The Reconsideration (IAD) that is the subject of this appeal is VACATED insofar as it denied issuance of a 1995 IFQ permit to Mr. Van Sky. In order to make Mr. Van Sky whole, we order RAM to adjust his IFQ account for regulatory area 3A for the 2000 halibut fishing season by including an additional amount equal to the IFQ he should have received in 1995 as a result of the initial issuance of 27,900 units of halibut QS that were awarded to him on January 31, 1995. This Decision takes effect September 8, 1999, unless by that date the Regional Administrator orders review of the decision. Any party, including RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m., Alaska Time, on August 19, 1999, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or Points and Authorities in support of the motion.

Edward H. Hein
Chief Appeals Officer

Randall J. Moen
Appeals Officer