

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
)
GREGORY L. BEAM,)
Appellant)
_____)
Appeal No. 95-0015
DECISION
June 11, 1999

STATEMENT OF THE CASE

The Appellant, Gregory Beam, filed a timely appeal of the Initial Administrative Determination [IAD] issued on January 17, 1995, by the Restricted Access Management [RAM] program.¹ The IAD denied Mr. Beam's request to have his halibut and sablefish quota share [QS] reassigned from vessel category "C" to vessel category "A" under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program. Mr. Beam has adequately shown that his interest is directly and adversely affected by the IAD. Because the record contains sufficient information on which to reach a final decision, and because there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered.²

ISSUE

Should Mr. Beam's halibut QS and sablefish QS be reassigned from vessel category "C" to vessel category "A"?

DISCUSSION

Under the regulations of the IFQ program, as implemented by RAM, all QS is assigned to one of four vessel categories. The assignment is based on which type or size of vessel was used by the applicant to harvest groundfish or halibut in the most recent of four calendar years from January 1, 1988 through September 25, 1991.³ A person's QS is assigned to vessel category "A" if, at any time during the person's most recent year of participation the person's vessel processed any groundfish or halibut that

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

²See, 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 regulations in question was unchanged by the renumbering.

³50 C.F.R. § 679.40(a)(5)(i).

was caught with fixed gear.⁴ Otherwise, QS is assigned to vessel categories B, C, or D, depending on the length overall [LOA] of the vessel. Category "A" QS authorizes the IFQ permit holder to harvest and process IFQ species (halibut or sablefish) on a vessel of any length.⁵

RAM assigned Mr. Beam's halibut QS and sablefish QS to vessel category "C" because its records showed that in his most recent year of participation, 1991, Mr. Beam fished only on his 51-foot vessel, the F/V IDA JUNE. The vessel category "C" assignment authorizes Mr. Beam to harvest his IFQ halibut or IFQ groundfish on a vessel of 60 feet or less, but does not allow him to process the fish aboard the vessel.⁶

Mr. Beam claims that his QS should have been assigned to vessel category "A" because the halibut landed from the F/V IDA JUNE in 1991 were processed aboard the vessel. Mr. Beam states that the fish were headed, iced, and cleaned aboard the vessel in a manner requiring "no further preparation, modification, or processing."⁷ Mr. Beam writes:

... heading halibut at sea on board a fishing vessel is an uncommon procedure and requires special attention and handling ... Once the head is off the fish, it must be properly cleaned, and disinfected, and stored as food in a properly protected condition because it is ready for sale to a consumer or to be shipped into commerce.⁸

Mr. Gail Stromme, the buyer of the fish at Sitka Sound Seafoods in Sitka, Alaska, testified that he inspected all halibut deliveries made from the F/V IDA JUNE between 1991 and 1993; that the halibut were headed, cleaned, and iced prior to delivery; and that he considered the halibut to have been processed under Alaska state regulations.⁹

RAM denied Mr. Beam's request to reassign his QS to vessel category "A" after concluding that heading halibut did not constitute "processing" as defined under the 1994 regulations for groundfish of the Gulf of Alaska.¹⁰ Under that definition, "processing" means "the preparation of fish to render it

⁴50 C.F.R. § 679.40(a)(5)(iii)(A).

⁵50 C.F.R. § 679.40(a)(5)(ii)(A).

⁶See, 50 C.F.R. § 679.40(a)(5)(ii)(C).

⁷See, Mr. Beam's letter of appeal, received March 21, 1995.

⁸See, Mr. Beam's letter to RAM, December 7, 1994.

⁹See, e.g., Mr. Gail Stromme's letter of April 28, 1994, and testimony of July 5, 1994.

¹⁰50 C.F.R. § 672.2 (1994).

suitable for human consumption, industrial uses, or long-term storage," but does not include "heading and gutting unless additional preparation is done."

The problem with using this definition is that halibut was not a groundfish for purposes of the regulations for groundfish of the Gulf of Alaska.¹¹ In fact, before 1996 there was no definition in the federal regulations for the processing of halibut.¹² Therefore, the 1994 definition relied upon by RAM does not apply to Mr. Beam's handling of his halibut in 1991.

In the absence of an applicable federal definition of processing, we look to the state of Alaska for a definition. The Alaska Department of Environmental Conservation's definition of processing halibut in 1991 applied to Mr. Beam's activities that year because the halibut were landed in Alaska. The state definition provided:

"processing" means any activity that modifies the physical condition of a fisheries product, including butchering, canning, cooking, dehydrating, freezing, pickling, salting, shucking, or smoking; if a fisheries product will be further processed in an establishment or vessel, "processing" does not include decapitating shrimp or gutting or gilling fisheries products on board the fishing vessel while on the fishing grounds, to maintain product quality or prevent loss of product by decomposition.¹³

Under that definition, the heading of halibut constituted processing because heading would be included in the term "butchering." Thus, we conclude that the heading of halibut aboard the F/V IDA JUNE in

¹¹The term "groundfish" still does not include halibut under current applicable federal regulations. *See*, 50 C.F.R. § 679.2 (1998).

¹²50 C.F.R. § 679.2 currently defines "processing" for all species covered under 50 C.F.R. Part 679, which includes halibut under the IFQ program. The definition reads:

Processing, or to process, means the preparation of, or to prepare, fish or crab to render it suitable for human consumption, industrial uses, or long-term storage, including but not limited to cooking, canning, smoking, salting, drying, freezing, or rendering into meal or oil, but does not mean icing, bleeding, heading, or gutting.

This has been the federal definition of processing halibut since July 1, 1996. *See*, 61 Fed. Reg. 31,230; 31,234 (June 19, 1996). Under this definition, Mr. Beam's handling of his halibut would not be considered processing.

¹³18 AAC § 34.910(31) (1991). The current state Department of Environmental Conservation definition of processing states:

"processing" means an activity that changes the physical condition of a seafood product, including butchering, thermal processing, cooking, dehydrating, freezing, pickling, salting, shucking, or smoking.

18 AAC § 34.990(49) (eff. 12/18/97).

1991 constituted processing.

That does not end the inquiry, however, for implicit in the IFQ regulations is a requirement that the processing must have been done lawfully in order to serve as the basis for obtaining a vessel category "A" reassignment.¹⁴ To be lawful, the processing must have been in compliance with applicable state and federal regulations in effect at the time.

In the IAD, RAM based its denial of Mr. Beam's claim for vessel category reassignment, in part, on its determination that his vessel was not licensed as a catcher/processor vessel by NMFS until 1992. [IAD, at 3]. The license to which RAM refers is the NMFS Federal Fisheries Permit for the Gulf of Alaska groundfish fishery, issued on December 16, 1991. As stated previously, however, groundfish does not include halibut. In 1991 there was no requirement that a catcher/processor vessel be issued a federal processing license in order to lawfully process halibut aboard the vessel. Therefore, we conclude that Mr. Beam's failure to have such a license in 1991 is not a proper basis for denying his request to reassign his QS to vessel category "A". But there were state law requirements with which Mr. Beam had to comply in order for the processing of halibut aboard his vessel to be considered lawful processing, for purposes of vessel category assignment.

Under Alaska state regulations in effect in 1991, Mr. Beam would have had to comply with at least three requirements for the processing of fish aboard his vessel to be lawful. Before processing the halibut, he would have needed to obtain an Alaska Department of Environmental Conservation [ADEC] seafood processor's permit [18 AAC § 34.020] and an Alaska Department of Revenue Fisheries Business License [AS 43.75.011], and he also would have had to file a written intent to operate with the Alaska Department of Fish and Game [5 AAC § 39.130].

RAM pointed out in the IAD that there was no evidence in RAM's records that Mr. Beam was licensed as a processor by the state of Alaska in 1991. Our own inquiry with the ADEC found that the F/V IDA JUNE did not have a seafood processor's permit in 1991.¹⁵ Therefore, we conclude that Mr. Beam was not in compliance with state regulations when he processed halibut aboard the F/V IDA JUNE in 1991. Consequently, we conclude that Mr. Beam's halibut were not lawfully processed and, therefore, he is not entitled to have his QS reassigned to vessel category "A".¹⁶

¹⁴Roger Attwood, Appeal No. 95-0108, April 2, 1999, at 2.

¹⁵ According to Ms. Riki Lebman of ADEC's Division of Environmental Health Seafood Processing Program, Mr. Beam was licensed for processing in 1992 and 1994, but not in 1991. [Exhibit 1]

¹⁶Because the noncompliance with the ADEC permit requirement makes Mr. Beam's processing unlawful for purposes of vessel category reassignment, we need not determine whether he was also in

Mr. Beam additionally argues that his QS should have been reassigned to vessel category "A" because the F/V IDA JUNE was capable of freezing halibut in 1991. He asserts, without any supporting evidence, that RAM has assigned vessel category "A" to the QS of other persons without requiring a showing that they actually processed groundfish or halibut in their most recent year of participation, but merely because RAM records show they made landings with a licensed catcher/processor vessel in their most recent year. This argument is unpersuasive. Such actions, even if true, would not authorize RAM to make the vessel category reassignment that Mr. Beam requests. Under 50 C.F.R. § 679.40(a)(5)(iii)(A), vessel category "A" is to be assigned only if the QS holder's vessel actually and lawfully processed groundfish or halibut in the most recent year of participation. If RAM improperly assigned vessel category "A" to other QS holders, that would not entitle Mr. Beam to have his QS vessel category improperly reassigned.

Finally, we note that denial of Mr. Beam's request for vessel category reassignment does not prevent him from continuing to handle his halibut as he did in 1991. Under the current federal definition of processing, 50 C.F.R. § 679.2, heading, gutting, and icing are not considered processing. For purposes of compliance with IFQ program requirements, this federal definition is controlling, rather than any state definitions. Therefore, Mr. Beam does not need to have his QS reassigned to vessel category "A" in order to continue heading, gutting, and icing his fish aboard his vessel. He may do so with his vessel category "C" QS. He would still need to comply with state processing and permitting requirements, but that is a concern for state authorities. Denying Mr. Beam's request for vessel category "A" reassignment, therefore, is consistent with the purposes and goals of the IFQ program in that it allows Mr. Beam to continue the type of fishing activities he was engaged in during his most recent year of participation, but does not grant him a windfall opportunity to expand his fishing operations and capacity.

FINDINGS OF FACT

1. Halibut was not a groundfish for purposes of the 1994 regulations for groundfish of the Gulf of Alaska.
2. Before 1996 there was no definition in the federal regulations for the processing of halibut.
3. In 1991 there was no requirement that a catcher/processor vessel be issued a federal processing license in order to lawfully process halibut aboard the vessel.
4. The F/V IDA JUNE did not have an Alaska Department of Environmental Conservation seafood processor's permit in 1991 as required under Alaska state regulations.

compliance with the state Department of Revenue and Department of Fish and Game requirements.

CONCLUSIONS OF LAW

1. The 1994 federal definition of "processing" relied upon by RAM does not apply to Mr. Beam's handling of his halibut in 1991.
2. The Alaska Department of Environmental Conservation's definition of processing halibut in 1991 applied to Mr. Beam's activities that year because the halibut were landed in Alaska.
3. The heading of halibut aboard the F/V IDA JUNE in 1991 constituted processing.
4. Processing must have been done lawfully in order to serve as the basis for obtaining a vessel category "A" reassignment.
5. To be lawful, the processing must have been in compliance with applicable state and federal regulations in effect at the time.
6. Mr. Beam's failure to have a federal processing license in 1991 is not a proper basis for denying his request to reassign his QS to vessel category "A".
7. Mr. Beam's 1991 halibut were not lawfully processed and, therefore, he is not entitled to have his QS reassigned to vessel category "A".
8. If RAM improperly assigned vessel category "A" to other QS holders, that would not entitle Mr. Beam to have his QS vessel category improperly reassigned.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED** on the grounds stated in this Decision. This Decision takes effect on July 12, 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 June 21, 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.

Randall J. Moen

Appeals Officer

Edward H. Hein
Chief Appeals Officer