

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of the) Appeal No. 95-0032
)
Estate of DONALD L. COISMAN,) DECISION
Appellant)
_____) February 25, 1998

STATEMENT OF THE CASE

Appellant, the estate of Donald Coisman,¹ filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division² [RAM] on March 6, 1995. The IAD denied the Appellant's application for Pacific halibut and sablefish quota share [QS] under the Individual Fishing Quota [IFQ] program because there was not sufficient evidence that Mr. Coisman leased the F/V YANKEE CLIPPER. An oral hearing was held on January 14, 1997, to determine if Mr. Coisman leased the F/V YANKEE CLIPPER during a QS qualifying year: 1988, 1989, 1990. The registered owner of the vessel, Mr. Bob Henry, testified at the hearing. Appeals Officer Randall Moen also interviewed Mr. Henry on July 11, 1997. The claimed lessee of the vessel, Donald Coisman, is deceased and was unavailable for testimony. Mr. Richard Rossie, a crew member, was also unavailable for testimony.

ISSUE

Whether Don Coisman leased the F/V YANKEE CLIPPER in a QS qualifying year.

BACKGROUND

About two months before Don Coisman died, he filed a timely Request for Application [RFA] for QS . He included with his RFA a signed statement that provided:

I fished about 6 boats in the last 21 years, from 84 feet to 36 feet.

84' I owned

40' I owned

¹Dan Coisman, Mr. Coisman's son, was appointed the personal representative of the estate of Donald Coisman on November 16, 1994, by the registrar of the Alaska Trial Courts, State of Alaska Third Judicial District.

²The Restricted Access Management Division was renamed Restricted Access Management Program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

61' I leased
36' I own

Don Coisman did not provide the name of the vessel he leased or the time period of the lease for the vessel he claimed on his RFA. He claimed on a separate document³ that the length of the F/V YANKEE CLIPPER was 61 ft. and that the vessel was used to clean up the EXXON VALDEZ oil spill in 1989.

After receiving the RFA, RAM mailed Don Coisman an Application for QS. The Application showed that he was ineligible for halibut QS and sablefish QS because he did not own or lease a vessel during a QS qualifying year. RAM told Don Coisman that he could contest the Application.

A few weeks later, RAM received Don Coisman's Application. The Application was signed by Dan Coisman, Don Coisman's son, on behalf of his father's estate (the Appellant). On the Application was a note from Dan Coisman stating that his father had passed away on September 1, 1994, and that his father had leased the F/V YANKEE CLIPPER in 1989 and 1990. Dan Coisman writes⁴ that his father assumed control of the vessel in 1988 to fish for halibut after the vessel failed to make money from shrimp, and that his father did not fish the early halibut openers in 1989 because he used the vessel to clean up the EXXON VALDEZ oil spill.

RAM's records show that halibut landings were made from the F/V YANKEE CLIPPER on October 12, 1989, June 9, 1990, and August 31, 1990, and that a sablefish landing was made from the vessel on May 31, 1990. The fish tickets show that the landings sold for \$1,555, \$3,430, \$15,117, and \$464, respectively, and that all of the landings were made on Don Coisman's fishing permit. RAM's records also show that Mr. Robert Henry was the vessel's registered owner between July 1988 and December 1990, and that he never applied for QS.

Don Coisman's Application for QS was denied by RAM for lack of evidence of a vessel lease. On appeal, Dan Coisman reasserted that his father leased the F/V YANKEE CLIPPER in 1989 and 1990.

Mr. Henry testified at the hearing that he entered into an oral agreement with Don Coisman in Seward, Alaska, in 1988, during the summer preceding the EXXON VALDEZ oil spill. The agreement was to "commercially fish and captain the F/V YANKEE CLIPPER." He characterized his arrangement with Don Coisman as a "working partnership," one in which he "hired" Don Coisman. He testified that under

³See, the Off-Hire Survey report, dated 9/7/89, signed by Mr. Don Coisman. (RAM's records show the vessel's length at 49 ft.).

⁴See, the affidavit of Dan Coisman, dated December 2, 1994.

the terms of the arrangement, food and fuel would be paid "off-the-top;" profits would be split 50-50, with crew shares paid out of Don Coisman's share; the gear would be paid by Mr. Henry; and Don Coisman would manage, run, fish, and crew the vessel. Mr. Henry's only restrictions on Don Coisman were to "follow the rules of the road" and to "catch as much fish as possible."

Mr. Henry also testified that he could disapprove of crew hire; that he could reclaim possession of the vessel at any time; and that his "working agreement" with Don Coisman was year to year. Both he and Don Coisman understood that the fish would be marketed at Icicle Seafoods, Inc. in Seward. Mr. Henry stated that while most arrangements between fishermen were "60/40," he agreed to a "50/50" split of profits because "when people are treated fairly they work better."

Mr. Henry further testified that (1) he was liable for all expenses; (2) he was not aboard the vessel during the harvesting of the halibut; (3) he helped prepare the vessel for fishing; (4) ice, bait, and fuel was paid from an account set up at the Seward cannery in both Don Coisman's name and the vessel's name; and (4) Don Coisman handled the expenses of the vessel's operations.

Finally, Mr. Henry testified that he did not file income tax returns for 1989 and 1990, and that he did not receive any income from commercial fishing during those years. He told Don Coisman to use Mr. Henry's share for the upgrade and maintenance of the vessel and to help pay for crew expenses. Mr. Henry could not recall whether Mr. Rossie witnessed the alleged oral agreement between him and Don Coisman in the summer of 1988. Mr. Henry did not have vessel insurance and bore a total loss when the F/V YANKEE CLIPPER sank in Christmas, 1990.

Later, in a follow-up interview,⁵ Mr. Henry stated that he had a "triple-net lease" arrangement with Don Coisman for the period of 1989 and 1990, and that if Mr. Coisman were still alive, he [Mr. Henry] would sign an affidavit acknowledging such. He further stated that he had *leased* the vessel to Don Coisman for the clean up of the EXXON VALDEZ oil spill.⁶

The following evidence was submitted in support of the lease of the F/V YANKEE CLIPPER during 1989 and 1990:

- State of Alaska fish tickets for landings of sablefish and halibut made from the F/V YANKEE CLIPPER in 1989 and 1990 on Mr. Coisman's state fishing permit;

⁵See, Appeals Officer Moen's telephone interview of Mr. Henry, July 11, 1997.

⁶See, the April 15, 1989, document, in which Mr. Henry agreed to "rent" or "lease" the F/V YANKEE CLIPPER to Don Coisman for the clean up of the EXXON VALDEZ oil spill. See also, the September 4, 1989, document from VECO, Inc., terminating VECO's agreement with Don Coisman for the charter of the F/V YANKEE CLIPPER for the clean up of the EXXON VALDEZ oil spill.

- Don Coisman's 1989 federal income tax return, Schedule C, showing gross income from commercial fishing (\$1,877) and oil spill cleanup (\$232,715), and lease expense deductions (\$117,306 and \$968), as a result of doing business in the name of the "YANKEE CLIPPER;"
- Don Coisman's 1990 federal income tax return, Schedule C, showing gross income from commercial fishing (\$21,729), and a lease expense deduction (\$1,035), as a result of doing business in the name of the "YANKEE CLIPPER;"
- various expense receipts for purchases of bait, food, ice, fuel, and vessel supplies and repair parts in the names of Don Coisman and the F/V YANKEE CLIPPER during 1989 and 1990;
- the September 17, 1996, affidavit of Mr. Richard Rossie, stating that (1) he was employed as a deck hand aboard the F/V YANKEE CLIPPER, from July 1987, until November or December 1990; and (2) he was at a meeting in October or November 1988, where Mr. Bob Henry orally agreed to *lease* the F/V YANKEE CLIPPER to Mr. Coisman and to split 50% of profits from commercial fishing, and other activities, after expenses;
- check receipts for payments to Don Coisman by Seward Fisheries, on the account of Don Coisman and the F/V YANKEE CLIPPER, between October 13, 1989, and October 15, 1990;⁷
- a statement of Don Coisman's account at Seward Cold Storage for activities of the F/V YANKEE CLIPPER between May 2, 1990, and September 4, 1990, showing checks issued to Don Coisman for fish sales and halibut adjustments, pursuant to charges for ice and bait;
- a handwritten agreement between Don Coisman and Bob Henry, dated April 15, 1989, for the lease of the F/V YANKEE CLIPPER to clean up the EXXON VALDEZ oil spill; and
- a September 4, 1989, document terminating Mr. Coisman's charter of the F/V YANKEE CLIPPER, from VECO, Inc.

DISCUSSION

⁷The checks were for as follows: \$772.85, (October 13, 1989); \$193.10., halibut adj., (October 20, 1989); \$128.60, halibut adj., (November 2, 1989); \$1,230, (June 11, 1990); \$2,022.70, (June 11, 1990); \$227.20, (June 14, 1990); \$14,907.58, (September 4, 1990); \$65.60, (September 7, 1990); and \$228, (October 15, 1990).

Under the regulations of the IFQ program, a person is qualified for QS if the person leased a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year, 1988, 1989, or 1990. 50 C.F.R. § 679.40(a)(2).⁸ An affidavit, signed by the parties to a lease, may be used as conclusive evidence of a lease. 50 C.F.R. § 679.40(a)(3)(iii).⁹ Proof of an oral lease may also be used to qualify a person for QS. 50 C.F.R. § 679.40(a)(3)(iii).¹⁰ Given the absence of a written lease in this case, and the unavailability of the claimed lessee (Don Coisman) to sign an affidavit of a lease, the question in this appeal is whether there is sufficient evidence of an oral lease of the F/V YANKEE CLIPPER for commercial fishing during the years 1989 and 1990.

The regulations do not define what constitutes a lease. This Office has identified seven factors that an appeals officer should consider in making a case-by-case determination of whether a business relationship should be recognized as a lease when there is no written agreement.¹¹ The factors include, but are not limited to:

- (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;
- (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 tax purposes and other purposes; and
- (7) whether the claimed lessee had a set or guaranteed term.

⁸Formerly, 50 C.F.R. § 676.20(a)(1).

⁹Formerly, 50 C.F.R. § 676.20(a)(1)(iii).

¹⁰Formerly, 50 C.F.R. § 676.20(a)(1)(iii).

¹¹*See, e.g., F/V Determined Partnership v. Big Blue, Inc.*, Appeal No. 95-0049, October 22, 1996, *aff'd* November 5, 1996; *Smee v. Echo Belle, Inc.*, Appeal No. 95-0076, August 1, 1996, August 20, 1996, *aff'd Smee v. N.M.F.S.*, C96-1512WD (W.D. Wash., June 9, 1997); *Kristovich v. Dell*, Appeal No. 95-0010, March 20, 1996, *aff'd* March 27, 1996.

As a guideline in weighing the factors, we stated in O'Rourke v. Riddle¹² that the North Pacific Fishery Management Council intended to award QS to persons who had supplied the means to harvest the fish, suffered the financial and liability risks to do so, and directed the fishing operations. In short, the Council intended QS for persons who, as lessees, had acted like entrepreneurs.¹³

I shall now consider the factors to determine whether the unwritten arrangement between Don Coisman and Mr. Henry was a vessel lease.

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

Mr. Coisman claimed on his tax returns and on his RFA that he leased the F/V YANKEE CLIPPER. Mr. Richard Rossie, a former crew member, claimed in his affidavit that he witnessed an oral agreement in November 1988 between Don Coisman and Mr. Henry for the lease of the vessel for commercial fishing. Mr. Henry doesn't recall whether Mr. Rossie was present, but asserts he entered into an agreement with Don Coisman beginning the summer of 1988 to commercially fish his vessel. The lease was for one year.

Mr. Henry characterized his arrangement as a "triple-net-lease,"¹⁴ and maintained that he would sign an affidavit acknowledging the existence of a lease. He referred to the arrangement as a "one-year working agreement with an open-end renewal," and a "working partnership," one in which he had "hired" Don Coisman to captain and fish the vessel. When asked if his share of the proceeds was payment for Don Coisman's use of the vessel, he replied that it was not. There is also a written document that shows that the F/V YANKEE CLIPPER was leased to Don Coisman (who chartered the vessel to VECO, Inc.) for the clean up of the EXXON VALDEZ oil spill in 1989.

While Don Coisman claimed on his RFA and tax returns that he leased the F/V CLIPPER, both documents were prepared after the relationship had ended, and for purposes of gaining tax savings and QS. While he claims that he and Mr. Coisman had a "triple-net-lease" arrangement, and that he would sign an affidavit acknowledging the lease, he also used language inconsistent with a lease when he stated that he had a "working agreement" and a "working partnership" with Don Coisman; that he "hired" Don Coisman to commercially fish his vessel for halibut; and that he did not consider his share of the

¹²Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995.

¹³According to WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 436 (1988), an "entrepreneur" is one who organizes, manages, and assumes the risks of a business venture in the expectation of gaining the profit.

¹⁴A "triple-net lease" is an arrangement in which the profits of a vessel's fishing operations are distributed on the basis of a boat share, a skipper's share, and a crew share.

proceeds as payment for the use of the vessel.

Mr. Richard Rossie's affidavit, Mr. Henry's claim that he leased the vessel in the summer of 1988, and the lease agreement for the cleanup of the EXXON VALDEZ oil spill, also lack relevancy. All three pieces of evidence relate to arrangements that existed in 1988, either for or before the EXXON VALDEZ oil spill, and before the period of commercial fishing at issue. At best, the evidence shows only that Mr. Henry leased the F/V YANKEE CLIPPER on two occasions prior to the relevant period.

In sum, there is no evidence that shows how the parties characterized their relationship at the relevant times during the preparation, harvest, landing, and marketing of the fish, and at the time of settlement. The evidence that exists shows only how the parties characterized their arrangement *after* their relationship, and that evidence is either conflicting, self-serving, or irrelevant.

Consequently, I find that the evidence of how the parties characterized their arrangement at relevant times is inconclusive

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

Neither the Appellant, nor Mr. Henry, dispute that Don Coisman *in fact* possessed, commanded, and navigated the F/V YANKEE CLIPPER during the period of the alleged lease. There is no evidence in the record that would lead a person to believe otherwise. RAMS's records show that the landings from the vessel were made on Don Coisman's state fishing permit during the relevant years (1989 and 1990). Consequently, I find that the weight of the evidence shows that Don Coisman possessed and commanded the vessel, and controlled its navigation during the relevant period.

Nonetheless, I do not give much weight to this factor because it is unclear, in light of Mr. Henry's testimony, whether Don Coisman was given exclusive possession and command of the vessel. According to Mr. Henry:

"The reason I gave Mr. Coisman so much room to operate ... [was] that I felt that even though it was not a real big boat, I felt that it couldn't have two bosses ... I tried to stay out of the way and not create conflict ... You can't have two captains on a small boat." The reason I didn't go out with them was that Don was supposed to be in charge as the captain, that was the way it was arranged to be."

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

Mr. Henry testified that he was not aboard the vessel at time of harvest, and that Don Coisman was in

charge of the vessel and decided where to fish during the halibut openers. RAM's records show that the fish was landed on Don Coisman's state fishing permit. Mr. Henry also testified that Don Coisman set up an account at Icicle Seafoods, Inc. in Seward for the purchase of ice, bait, and fuel, where the fish was marketed. Given Mr. Henry's testimony, and the nature of Don Coisman's responsibilities, it can be reasonably assumed that Don Coisman was the person who decided where to fish and to market the fish. Therefore, I find the weight of the evidence shows that Don Coisman directed the fishing operations of the vessel during the relevant time. However, as discussed in Kristovich, at 9, this factor is not particularly persuasive in this case because it is also consistent with an owner/hired skipper arrangement.

4. Whether the claimed lessee had the right to hire, fire, and pay the crew.

Mr. Henry testified that Don Coisman had the right to hire, fire, and pay the crew during the relevant period. Don Coisman's tax returns for 1989 and 1990 show that Don Coisman claimed business deductions for wages paid to the crew during that period. There is no proof that Mr. Henry (or anyone else) paid the crew.

Mr. Henry testified that he did have "input" with regard to crew hire, but only if he "disagreed with somebody" because the person "didn't work, or was a drunk." There is no evidence that Mr. Henry ever exercised his right to disapprove of crew hire. Mr. Henry did state that the only restrictions placed on Don Coisman was that he had to follow the rules of the trade and catch as much fish as possible -- but that is something that would be normally required or expected under any business arrangement. Consequently, I find the weight of the evidence shows that Don Coisman was the person responsible for the hire, fire, and payment of the crew during the relevant period. The weight of this factor, however, is diminished by Mr. Henry's right to disapprove of the crew.

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

As with the other factors, a flexible approach is needed when considering responsibility for operational expenses. Because of the great variety in commercial fishing business arrangements and in the way expenses and risks of fishing operations are allocated between the parties, no single expense or category of expenses is likely to determine whether the parties had a lease agreement or not. Whether or not they represent a capital investment in the vessel, operating expenses should be considered only to the extent that they shed light on the question of whether a vessel lease existed. The question is not which party invested more money in the fishing operations; rather, it is whether the payments, responsibilities, risks, and method of operation -- as evidenced by the handling of expenses -- were more consistent with a lease than some other arrangement, and whether they, therefore, tend to show that there was a lease. "Operating expenses of the vessel" are those expenses that are attributable to, and necessitated by, the fishing operations in question. Smee, at 12-14.

The Appellant submitted several receipts and cannery account statements related to the F/V YANKEE CLIPPER in 1989 and 1990. The receipts and statements show that fuel, ice, bait, and some parts and supplies, were charged in the names of both Mr. Coisman and the F/V YANKEE CLIPPER; and that fuel, food, moorage, boat taxes, licenses, and some parts and supplies, were paid by cash or check by Don Coisman. There is no evidence that Mr. Henry directly paid any operating expenses of the F/V YANKEE CLIPPER, or that Mr. Henry directly reimbursed Don Coisman for funds advanced to pay for the vessel's operating expenses. Nor is there any evidence that Mr. Henry paid Don Coisman as an employee or independent contractor. There is also no evidence that the processor or the vendors were told that they could not look to the owner of the vessel for purchases made by Don Coisman in the name of the vessel.¹⁵ The cannery statements and fish tickets also show that Don Coisman received most, if not all, of the income from the vessel's commercial fishing operations.

Mr. Henry acknowledges that Don Coisman received the income and paid the bills of the vessel's operations, and that he did not share a joint bank account with Don Coisman. Mr. Henry maintains, however, that he was liable for all of the vessel's expenses, including damage to the vessel or gear. The evidence shows that Mr. Henry did indeed bear substantial financial risk. He was at risk, as the vessel's owner, for expenses of fuel, ice, bait, parts and supplies charged in the name of the vessel, and for unpaid moorage fees or property taxes on the vessel.

There is no evidence that Mr. Henry was actually paid for the lease of the vessel or received any income from the vessel's commercial fishing operations. Mr. Henry states that he directed Don Coisman to use his share of the profits to pay the crew and to maintain the vessel. If Mr. Henry's share of profits or lease fee was in fact retained by Don Coisman for payment of vessel or crew expenses, or if there were no profits for distribution, Mr. Henry would have indirectly paid for at least a portion of the business's operating expenses. Given that there is no proof that Mr. Henry was actually paid for the lease of the vessel or received income from the vessel's commercial fishing operations, I find that Mr. Henry indirectly paid for at least a portion of the vessel's operating expenses.

In sum, I find that both Don Coisman and Mr. Henry equally shared in the operating expenses, and bore financial risks, associated with the fishing of the F/V YANKEE CLIPPER.

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

Taxes.

¹⁵See, *Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 605 (5th Cir.) *cert. denied*, 479 U.S. 984 (1986), where a party claiming that there was no maritime lien against the vessel for supplies furnished for its ventures bears the burden of establishing that the supplier relied solely on the personal credit of the owner or the charterer.

Don Coisman claimed the F/V YANKEE CLIPPER as a commercial fishing business on his federal income tax returns for 1989 and 1990. In 1989, he claimed business tax deductions for use of halibut gear, fishing pots, and survival suits. In both 1989 and 1990 he claimed deductions for fuel, oil, bait, ice, and food, supplies, taxes, licenses, permits, utilities, moorage, storage, vessel repairs and maintenance, and the lease of the vessel.

In comparing Don Coisman's tax returns with the state fish tickets for the F/V YANKEE CLIPPER in 1989 and 1990, it appears that Don Coisman claimed approximately all of the income related to the vessel's operations on his tax returns during that period. In 1989, he claimed \$1,877 in fishing income, with halibut landings of \$1,555.85 from the vessel. In 1990, he claimed \$21,729.08 in fishing income, with halibut and sablefish landings totalling \$19,102.38. Don Coisman's tax returns show no profits from the vessel's operations in 1989 and 1990, after business deductions for lease payments and trip expenses. Mr. Henry admits that he did not file tax returns in 1989 and 1990. While Don Coisman claimed lease expense deductions for the F/V YANKEE CLIPPER, there is no evidence that he paid Mr. Henry any income from the vessel's fishing operations during those years.

In sum, I find Don Coisman treated the fishing operations of the F/V YANKEE CLIPPER as his commercial fishing business for tax purposes during the relevant period. However, I give little weight to this finding. While Mr. Coisman may have claimed deductions for lease payments on his tax returns, there is no evidence that he in fact paid Mr. Henry any proceeds from the vessel's fishing operations.

Handling of expenses.

Mr. Henry testified that Don Coisman kept track of the vessel's expenses and that he reported the status of those expenses to Mr. Henry. Mr. Henry stated: "He [Don Coisman] presented me with a figure, and I agreed with it -- it was never out of line." If the vessel's operations were solely the business of Don Coisman, it is likely that Don Coisman would not have been expected to account for the vessel's expenses. Therefore, I find that Don Coisman did not treat the fishing operations as part of his business for accounting purposes.

7. Whether the claimed lessee had a set or guaranteed term.

A finding that an agreement does not have a guaranteed term may not always be fatal to finding that there was a lease.¹⁶ Nevertheless, the question of whether the arrangement had a set term of duration is very helpful in resolving whether an arrangement is a lease.

¹⁶Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996, August 20, 1996, *aff'd Smee v. N.M.F.S.*, C96-1512WD (W.D. Wash. June 9, 1997).

Mr. Henry testified that he had a "one-year working agreement" in 1988 with Don Coisman, with an "open-end renewal." He also stated that he could reclaim the vessel at any time. There is no evidence that Mr. Henry ever exercised his right to reclaim the vessel. Mr. Henry's testimony raises the question of how a "leased" vessel could be reclaimed at will, or why the owner/lessor of a vessel would refer to a "lease" arrangement as a *working* agreement. I find that a *working* agreement, under which *the vessel* could be reclaimed at will, is more consistent with an owner/skipper arrangement (or some other non-lease arrangement).

Thus, while it can be reasonably assumed that the parties understood that the vessel would be used by Don Coisman during the halibut openers (and for sablefish fishing), I find that given Mr. Henry's testimony, the evidence is inconclusive with regard to whether Don Coisman had the right to the exclusive use of the vessel during that period.

Summary of the evidence.

Having reviewed the evidence relating to the existence of a vessel lease, I conclude the preponderance of the evidence shows that Don Coisman did not lease the F/V YANKEE CLIPPER from Mr. Henry for commercial fishing during a QS qualifying year. Perhaps, if Don Coisman had been alive and able to testify, the result would have been different. It is also probable, but only speculative, based on Mr. Henry's testimony, that if Mr. Coisman had been alive, an affidavit of a vessel lease would have been signed by the parties.

There were many points in favor of a lease. Don Coisman paid for, and bore financial risk with regard to, the vessel's operating expenses. He treated the vessel as his business for federal tax purposes, claiming all of the income from the vessel's operations, and deductions for the lease of the vessel, on his federal tax returns. Mr. Coisman also assumed various responsibilities, with regard to the vessel's operations. He handled the expenses; hired the crew; possessed, operated, and skippered the vessel; decided where to fish; and landed the fish on his fishing permit. For the most part, the evidence shows that no restrictions were placed on his conduct, other than to catch as much fish as possible, safely and legally. It is noteworthy, as well, that Mr. Henry never filed for QS, and that Don Coisman did. Finally, Mr. Henry contends that he would be willing to sign an affidavit of a lease.

These points, however, are outweighed by evidence showing that Mr. Henry, the claimed lessor, also indirectly paid for, and bore financial risk, with regard to the vessel's operating expenses, and never received any income for the use of the vessel, during the relevant period. Mr. Henry testified that he could reclaim the vessel at any time; and while Mr. Coisman's responsibilities were substantial, they were no different than that of a hired skipper or partner. Mr. Henry also used language inconsistent of a lease. Mr. Henry characterized the relationship with Mr. Coisman as a "working partnership," in which he "hired" Mr. Coisman to fish and captain his vessel. Thus, it was never clear to what extent, if any, Mr. Coisman had the exclusive right to the use of the vessel; or to what extent, if any, he was

obligated to pay Mr. Henry a stipulated price for the use of the vessel.

The evidence, on balance, showed the arrangement was more consistent of a partnership or joint venture, than a vessel lease. Mr. Henry testified that Mr. Coisman reported food and fuel expenses to Mr. Henry. Both Mr. Coisman and Mr. Henry were responsible for potential crew injuries, both paid for operating expenses, and both were at risk for unpaid expenses arising from the venture. The nature of the arrangement, itself, is inconsistent of a vessel lease. Under the arrangement, food and fuel were to be paid "off-the-top," with profits split "50/50." As a consequence, Mr. Henry indirectly shared these trip expenses with Mr. Coisman, and was at risk for the expenses in the event of a "hole" trip. Consequently, I find the weight of the evidence shows that the arrangement between Mr. Henry and Mr. Coisman was something other than a lease, and more of a partnership or joint venture.

FINDING OF FACT

Mr. Coisman did not lease the F/V YANKEE CLIPPER for the commercial fishing of halibut and sablefish during a QS qualifying year.

CONCLUSION OF LAW

The qualifying pounds of halibut and sablefish landed from the F/V YANKEE CLIPPER during the period of October 12, 1989, through August 31, 1990, should not be awarded to the Appellant.

DISPOSITION

The Division's IAD denying qualifying pounds of halibut and sablefish QS to the Appellant is **AFFIRMED**. This decision takes effect on March 27, 1998, unless by that date the Regional Administrator orders the review of the decision.

Any party, including 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 the tenth day after the date of this decision, March 9, 1998. A Motion for Reconsideration must be 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. 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.

Randall J. Moen

Appeals Officer