

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 95-0055
)	
OCEAN RESOURCES, INC.,)	DECISION
Appellant)	
_____)	September 22, 1998

STATEMENT OF THE CASE

Appellant Ocean Resources, Inc. filed a timely appeal of two Initial Administrative Determinations [IADs] issued by the Restricted Access Management Program¹ [RAM] on March 20, 1995, and August 3, 1995. The IADs denied Appellant's application for sablefish quota share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish because it had not harvested sablefish with fixed gear during the QS qualifying period (1988, 1989, or 1990). 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

Whether Appellant harvested sablefish with fixed gear during the QS qualifying period.

BACKGROUND

Appellant made landings of sablefish from the F/V NORTHERN AURORA during the QS qualifying period, but was denied sablefish QS on grounds that it had not harvested the fish with fixed gear. RAM's records show that Appellant had harvested the fish with trawl gear.

On January 19, 1996, Appeals Officer Randall Moen telephoned Mr. Dale Dier, Appellant's representative, to ask if Appellant had proof that it had harvested the sablefish with fixed gear. Mr. Dier admitted that the fish had been caught with trawl gear, and stated that he would seek an exemption from the North Pacific Fishery Management Council.

Appellant claims in its appeal that the IFQ regulations, which require a person to harvest sablefish or halibut with fixed gear during the QS qualifying period, violate the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

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)(2) and (3); formerly 50 C.F.R. § 676.25(g).

DISCUSSION

To be considered a "qualified person" for QS under the regulations of the IFQ program, a person must have owned or 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.³ "Fixed gear" for sablefish harvests means all hook-and-line gear, and pot gear used to make a legal landing.⁴

Given that RAM's records do not show that Appellant harvested sablefish with fixed gear during the QS qualifying period, and that Appellant admits to having harvested sablefish with trawl gear during that period, I find that Appellant did not harvest sablefish with fixed gear during the QS qualifying period.

Appellant argues that the regulations, which require that sablefish must be harvested with fixed gear, are unconstitutional. As an Appeals Officer, I must presume the constitutionality of the IFQ regulations.⁵ Consequently, Appellant's challenge to the legality of the IFQ program is not within the purview of this Office. Therefore, because Appellant did not harvest sablefish with fixed gear during the QS qualifying period, and because this Office does not have the authority to ignore the requirements of the IFQ regulations, I conclude that Appellant is not a "qualified person" for sablefish QS.

FINDINGS OF FACT

Appellant did not harvest sablefish with fixed gear during the QS qualifying period.

CONCLUSIONS OF LAW

1. Appellant's challenge to the legality of the IFQ program is not within the purview of this Office.
2. Appellant is not a "qualified person" for sablefish QS.

DISPOSITION

The IADs denying Appellant's application for sablefish QS are **AFFIRMED**. This Decision takes effect October 21, 1998, unless by that date the Regional Administrator orders review of the Decision.

³50 C.F.R. § 679.40(a)(2); formerly 50 C.F.R. § 676.20(a)(1).

⁴50 C.F.R. § 679.2(2)(i); formerly, 50 C.F.R. § 676.11 (definitions).

⁵*See, e.g.,* George Ramos, Appeal No. 94-008, Regional Director's Decision on Review, at 4, April 21, 1995; and Charles J. Petticrew, Appeal No. 95-0008, July 3, 1996, *aff'd* August 2, 1996.

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 October 1, 1998, 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