

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 95-0062
)
DARRELL D. WELLS,) DECISION
Appellant)
_____) January 8, 1997

STATEMENT OF THE CASE

Appellant Darrell Wells filed a timely appeal of an Initial Administrative Determination [IAD] of the Restricted Access Management Division [Division], dated March 20, 1995. The IAD denied Mr. Wells's application for halibut quota share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish because he had failed to prove that he had owned or leased a vessel from which halibut landings were made during the QS qualifying years of 1988, 1989, or 1990. He has adequately shown that his interest is directly and adversely affected by the IAD. Mr. Wells requested a hearing to prove that he had a vessel lease that would qualify him for halibut QS. Because the record contains sufficient information on which to reach a final decision and there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered. 50 C.F.R. § 679.43(g).¹

ISSUES

1. Whether Mr. Wells leased a vessel that qualifies him for halibut QS.
2. Whether certain additional qualifying pounds of sablefish should be allocated to Mr. Wells.

SUMMARY

Mr. David Shoemaker was the registered owner of the F/V JAVA during the period of Mr. Well's alleged lease of the vessel. A lease affidavit, signed by Mr. Shoemaker, which was submitted to this office after the filing of Mr. Wells's appeal, acknowledges Mr. Wells's lease of the F/V JAVA. The affidavit is conclusive evidence of a vessel lease. Mr. Wells is, therefore, qualified to receive halibut QS on the basis of the affidavit, which shows that a lease of the F/V JAVA from Mr. David Shoemaker was in effect during the period of the halibut landings in question [May, June, and September of 1988].

Mr. Wells's claim for additional qualifying pounds of sablefish is not within the scope of this appeal.

¹Formerly 50 C.F.R. § 676.25(g)(3)(iii). All IFQ regulations were renumbered, effective July 1, 1996. See, 61 Fed. Reg. 31,270 (1996). The wording of the regulations was unchanged by the renumbering.

Even if construed as a separate appeal, it is untimely because it was not brought within the time period for filing an appeal following the issuance of an IAD. In addition, Mr. Wells has not produced evidence sufficient to establish that he held a lease of the F/V JAVA on the date of the sablefish landing in question. For all these reasons, his sablefish claim is denied.

BACKGROUND

Mr. Wells claimed on his Request for Application [RFA] for halibut and sablefish QS that he had leased three vessels: the F/V MICHAEL M, from 1981, with no ending date; the F/V CHINA B, from April 1, 1991, through April 1, 1992; and the F/V JAVA, from March 15, 1988, through May 1, 1989. He thereafter received a QS Data Summary, informing him that (1) he qualified for sablefish QS based on the lease of the F/V MICHAEL M during the period of June 6, 1986, through December 31, 1991; and (2) he did not qualify for halibut QS. Although given 90 days to respond, he did not contest the QS Data Summary. The Division awarded Mr. Wells sablefish QS on December 16, 1994, and issued an IAD denying his halibut QS application on March 20, 1995.

On May 18, 1995, Mr. Wells filed a timely appeal of the IAD, claiming halibut QS based on the lease of a vessel during the QS qualifying years period. He did not specify the name of the vessel in his appeal. On August 2, 1996, Mr. Wells filed several documents in response to an Order to Produce Evidence in support of his claim issued by this Office. The documents included an affidavit of a lease of the F/V JAVA in late 1987 until the spring of 1989, from the vessel's owner, Mr. David Shoemaker; and a letter² from Mr. Wells's attorney, Brian Hanson, who stated that Mr. Wells's claim on appeal was solely³ for halibut landed in 1988 and for sablefish landed on April 29, 1989, both under an oral lease of the F/V JAVA. Mr. Wells's claim for the April 29, 1989, sablefish landings was made for the first time on appeal.

DISCUSSION

1. Whether Mr. Wells leased a vessel that qualifies him for halibut QS.

To qualify for QS under the IFQ program, as implemented by the Division, a person must have owned or leased a commercial fishing vessel at the same time that legal landings of halibut or sablefish were

²See the RESPONSE TO ORDER TO PRODUCE EVIDENCE submitted by Mr. Brian Hanson on August 2, 1996, on behalf of Mr. Wells.

³Mr. Hanson writes: "Appellant [Mr. Wells] makes no claim for quota share for landings made from the vessels MICHAEL and CHINA B."

made from that vessel during a QS qualifying year, 1988, 1989, or 1990. 50 C.F.R. § 679.40(a)(2).⁴ Mr. Wells claims that he leased a vessel that qualifies him for halibut QS. As proof of his claim he submitted an affidavit of a lease of the F/V JAVA, signed August 2, 1996, by Mr. David Shoemaker, as the vessel's former owner. The affidavit provides:

"I, DAVID SHOEMAKER, being first duly sworn, upon oath, state as follows:

1. I am the former owner of a 38' vessel named the JAVA, Official Number 610583.
2. In late 1987 when I owned the F/V JAVA I leased the JAVA to Darrell D. Wells. I continued to lease the JAVA to Mr. Wells until the late spring of 1989 when I sold the JAVA to Tim Troyer⁵ ..."
3. The lease and its terms were all made verbally with Mr. Wells. Under the terms of the lease, I received 35% of the gross proceeds from the sale of all fish caught from the JAVA. Mr. Wells paid for all related expenses, maintenance and repairs, except I paid for insurance."

Mr. Wells also submitted other relevant documents as evidence of a lease: his 1988 federal income tax return, which showed that he claimed a \$37,531 business expense on Schedule C for a 35 percent boat share payment to Mr. David Shoemaker; receipts for expenses in 1988 relating to the F/V JAVA; and checks for lease payments to David Shoemaker in 1988.

The Division's official record shows that halibut landings⁶ were made from the F/V JAVA when Mr. David Shoemaker was the vessel's registered owner⁷ and during the period of Mr. Wells's purported lease. The record also shows that Mr. Shoemaker never applied for QS for the F/V JAVA or any other vessel, and that no one else has claimed credit for, or received QS resulting from, halibut landings made from the vessel in 1988.

Under the IFQ regulations, a notarized statement from the vessel owner and lease holder attesting to

⁴Formerly 50 C.F.R. § 676.20(a)(1).

⁵The Division's records show that Mr. Tim Troyer was the F/V JAVA's registered owner on March 8, 1989, at least through December 31, 1991. The Division uses Commercial Fisheries Entry Commission [CFEC] vessel license records for purposes of determining vessel ownership.

⁶The halibut landings were in May, June, and September, 1988, and totalled 19,031 qualifying pounds.

⁷According to CFEC records, David Shoemaker was the registered owner of the F/V JAVA between December 28, 1984, and December 31, 1988.

the existence of a vessel lease agreement during the QS qualifying years can be conclusive evidence of a vessel lease. To be conclusive, the statement must identify the leased vessel and indicate the name of the lease holder and the period of time during which the lease was in effect. Other evidence which tends to support a vessel lease, may also be admitted. 50 C.F.R. § 679.40(a)(3)(iii).⁸

Mr. Shoemaker's affidavit acknowledges a verbal lease agreement for the F/V JAVA during the period from late 1987 until late spring 1989 between him, as the vessel's owner, and Mr. Wells, as the vessel's lease holder. The exact dates of the claimed lease are not stated in the affidavit. In his RFA, Mr. Wells specified that his claimed lease of the F/V JAVA was in effect from March 15, 1988, until May 1, 1989. This claimed starting date of the lease period is several months later than the "late 1987" starting time stated by Mr. Shoemaker. Nonetheless, Mr. Wells and Mr. Shoemaker are in agreement that the lease was in effect on the dates of the halibut landings. The word "lease" is specifically used by Mr. Shoemaker, and there is no evidence of fraud, duress, mistake, coercion, or incapacity in the affidavit's execution. While the affidavit is not signed by Mr. Wells, I shall infer his signature and agreement, given that he is offering it as proof of a vessel lease.

Given that the affidavit is valid on its face and notarized, that it clearly refers to the existence of a vessel lease agreement within the QS qualifying period, and that it identifies the name of the leaseholder, the name of the vessel, and the relevant time period during which the lease was in effect, I conclude that the affidavit contains all of the necessary elements to be conclusive evidence of a vessel lease and is such. Mr. Wells has also produced other evidence that tends to support the existence of a vessel lease, namely, a federal tax return, receipts for vessel expenses, and checks for lease payments. The Division's official record shows that Mr. Shoemaker was the registered owner of the F/V JAVA when the 1988 halibut landings were made from the vessel, and that neither he nor anyone else has claimed credit for, or received QS resulting from, those landings. Therefore, after consideration of all the evidence, I conclude that Mr. Wells leased a vessel that qualifies him for halibut QS.

2. Whether certain additional qualifying pounds of sablefish should be allocated to Mr. Wells.

Mr. Wells was awarded sablefish QS on November 16, 1994. As part of this appeal of the IAD relating to his application for halibut QS, he now raises for the first time a claim for additional qualifying pounds of sablefish. He seeks credit for one landing made from the F/V JAVA on April 29, 1989, on the grounds that he held a lease of the vessel at that time. This claim was never raised before the Division and was not considered in the IAD that is the subject of this appeal. Therefore, it is not properly within the scope of this appeal.

Even if I were to find that Mr. Wells's claim to these additional sablefish pounds was included in his

⁸Formerly 50 C.F.R. § 676.(a)(1)(iii).

original sablefish application and claim, his opportunity to appeal the amount of sablefish QS issued to him has long passed. Although Mr. Wells never received a formal, written IAD from the Division concerning his claim for additional sablefish pounds, this office has ruled in Tiger, Inc.⁹ that issuance of QS constitutes an IAD, which is appealable within the time period then in effect for filing an appeal. The period for filing an appeal at that time was 90 federal working days following the issuance of an IAD.¹⁰ Because Mr. Wells's sablefish appeal comes nearly two years after his sablefish QS was issued, it must be denied as untimely.

Finally, the Division's official record shows that the registered owner of the F/V JAVA on April 29, 1989, the date of the sablefish landing in question, was Mr. Tim Troyer, not David Shoemaker. Mr. Wells has presented evidence of having held a vessel lease only from Mr. Shoemaker, notwithstanding that on his RFA, Mr. Wells claimed that his lease was in effect until May 1, 1989, when Mr. Shoemaker was apparently no longer the owner. Therefore, without more evidence to establish the actual dates of his vessel lease with Mr. Shoemaker, or to establish whether he held another lease from Mr. Troyer, it is doubtful that Mr. Wells could prevail on the merits of his sablefish claim, even if his appeal had been timely filed.

For all these above-stated reasons, I deny Mr. Wells claim to additional sablefish QS.

FINDINGS OF FACT

1. The affidavit of Mr. David Shoemaker, submitted by Mr. Wells, refers to a verbal lease agreement for the F/V JAVA for the period of late 1987 and late spring 1989.
2. There is no evidence of fraud, duress, coercion, mistake, or incapacity in the execution of the affidavit.
3. All of the halibut landings made in 1988 from the F/V JAVA occurred when Mr. Shoemaker owned the vessel, and during the period for which he states that he leased the F/V JAVA to Mr. Wells.
4. Mr. Wells claimed additional QS, based on landings of sablefish from the F/V JAVA on April 29, 1989, for the first time on appeal, two years after receiving his sablefish QS, and more than a year after the filing of his appeal.

CONCLUSION OF LAW

⁹Appeal No. 95-0100, November 17, 1995, at 6, *aff'd* March 4, 1996.

¹⁰*See* 60 Fed. Reg. 6448 (1995).

1. The affidavit of Mr. David Shoemaker constitutes conclusive evidence of a vessel lease.
2. Mr. Wells leased a vessel [the F/V JAVA] that qualifies him for halibut QS.
3. The issuance of Mr. Wells's sablefish QS constituted an IAD.
4. Mr. Wells's claim for additional qualifying pounds of sablefish, based on landings from the F/V JAVA on April 29, 1989, is outside the scope of this appeal; if characterized as a separate appeal, it is untimely because the deadline for appealing the amount of sablefish QS he received has passed.

DISPOSITION AND ORDER

The Division's IAD denying Mr. Wells's application for halibut QS is VACATED. The Division is ORDERED to amend the Division's official record to reflect that Mr. Wells held a lease of the F/V JAVA from Mr. Shoemaker when the halibut landings were made from the vessel in May, June, and September of 1988.

This decision takes effect on February 7, 1997, unless by that date the Regional Administrator orders review of the decision. Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 4:30 p.m. Alaska Standard Time, on the tenth day after the date of this Decision, January 21, 1997. 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. 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.

Because Mr. Wells still has an opportunity to receive halibut QS and the corresponding IFQ for the 1997 fishing season, I recommend that the Regional Administrator expedite review of this Decision and, if there is no substantial disagreement with it, promptly affirm the Decision and thereby give it an immediate effective date.

Randall J. Moen
Appeals Officer

Edward H. Hein
Chief Appeals Officer