

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 95-0073
)	
ALWERT FISHERIES, INC.,)	
Appellant)	
)	DECISION
and)	
)	
OREGON SEAFOOD PRODUCERS)	
and DOROTHY L. PAINTER,)	March 21, 1996
Respondents)	
_____)	

STATEMENT OF THE CASE

Appellant Alwert Fisheries, Inc.,¹ appeals an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on January 18, 1995. The IAD denied the Appellant's claim to certain qualifying pounds of halibut landed from the F/V BUCCANEER between January 1, 1984, and May 1, 1988. The qualifying pounds denied to Appellant were allocated equally to Oregon Seafood Producers [OSP] and Dorothy L. Painter. The appeal was timely filed and the Appellant has adequately alleged that its interests are directly and adversely affected by the IAD. The Appellant requested a written hearing on certain legal issues and on the intent of the parties to form a vessel sales agreement. Because the intent of the parties is not relevant in this appeal and because the basic issues are policy and legal issues, no hearing was ordered.² The parties were so advised on August 16, 1995, and the record was closed.

ISSUE

1. Whether eligibility for the initial issuance of Quota Share [QS] may be assigned.
2. Whether a person may be a "successor-in-interest" to a qualified person who is still in existence on

¹Quota Share was issued to the Appellant as William E. Alwert, an individual. The IAD was addressed to Mr. Alwert as an individual. The appeal was initially filed (May 24, 1995) by William E. Alwert, but subsequently the same appeal was refiled (May 31, 1995) under the name Alwert Fisheries, Inc. Since that time, this appeal has listed the corporation as the Appellant.

²As provided in 50 C.F.R. § 676.25(g)(3), a hearing may not be ordered unless, among other things, "There is a genuine and substantial issue of adjudicative fact for resolution at a hearing. A hearing will not be ordered on issues of policy and law."

the basis of a vessel sales agreement entered into with the qualified person.

BACKGROUND

William E. Alwert filed a timely Request for Application [RFA] for QS as an individual. The RFA included a Form D, which listed Mr. Alwert as the only owner of the F/V BUCCANEER. The RFA also included a Form C, which indicated that Alwert Fisheries, Inc., was a dissolved corporation. Mr. Alwert entered a corporate tax ID number on the form, but did not indicate the date of dissolution. On the basis of its official record, which showed Mr. Alwert as the registered owner of the vessel from November 3, 1983, through December 31, 1991, the Division allocated all the qualifying pounds of halibut that had been landed from the vessel to him as an individual.

Subsequently, Dorothy L. Painter and Oregon Seafood Producers [OSP]³ filed timely RFAs, in which each claimed a 25 percent undivided ownership interest in the F/V BUCCANEER. Ms. Painter's interest was for the period March 8, 1982, through May 1, 1988. Oregon Seafood Producers listed their period of ownership as 1974 through May 1, 1988.

A United States Coast Guard abstract of title for the F/V BUCCANEER and other supporting documents submitted by the Respondents show that as of February 18, 1981, OSP owned 50 percent of the vessel and Alwert Fisheries, Inc., owned the other 50 percent interest. On March 8, 1982, OSP transferred a 25 percent interest in the vessel to Ted Painter, Sr., and Dorothy Painter, as joint tenants with right of survivorship. On February 27, 1986, Ted Painter, Sr., transferred his interest to Dorothy, so that she acquired an undivided 25 percent interest in the vessel. Ted Painter, Sr., died on October 16, 1988, leaving Dorothy as his successor-in-interest to any claims based on his interest in the vessel for the period March 8, 1982, through February 27, 1986.

Alwert Fisheries, Inc., OSP, and Ted and Dorothy Painter entered into a "TENANTS IN COMMON AGREEMENT" on January 15, 1982. Under the agreement, the parties set forth their rights to the F/V BUCCANEER and to other assets that they owned jointly. The agreement listed their respective interests as:

Alwert Fisheries, Inc.	50%
Oregon Seafood Producers, Inc.	25%
Ted Painter, Sr. & Dorothy Painter	25%

Also on January 15, 1982, the same parties entered into a "PARTNERSHIP AGREEMENT" to conduct business under the name BUCCANEER ENTERPRISES. The purpose of the partnership

³Ted Painter, Jr., is president of Oregon Seafood Producers, Inc. He signed the RFA and other documents on behalf of the corporation.

was to operate the F/V BUCCANEER in the commercial fishing industry. The parties' respective interests in the partnership were the same as their interests in the vessel. Both these agreements were amended on February 27, 1986, to authorize and reflect Ted Painter, Sr.'s transfer of his interest in the vessel and other property held jointly by the tenants to Dorothy Painter.

On June 9, 1988, the Appellant and the Respondents entered into an agreement by which OSP and Dorothy Painter agreed to sell to Appellant their interests in the F/V BUCCANEER and other tangible assets held in common and used in the operation of the vessel.⁴ The parties have stipulated that the effective date of the sale was May 1, 1988, notwithstanding the contrary date listed in the abstract of title. [Alwert letter, March 5, 1996; Dennis Ostgard telephone call, March 1, 1996.]

The parties disagree about whether the sale included IFQ rights. Appellant claims that it did; the Respondents argue that it did not. The agreement, itself, does not specifically mention IFQ rights. In fact, the IFQ program was not in existence at the time. The Division concluded in its IAD that the agreement did not provide for IFQ rights, and that even if it did, it could not be used as a basis for QS because eligibility for the initial issuance of QS may not be assigned and because there can be no successor-in-interest to a qualified person who is still in existence. Consequently, the Division denied Appellant's claim and allocated qualifying pounds to OSP and Dorothy L. Painter, based on their respective 25 percent interests in the F/V BUCCANEER between January 1, 1984, and May 1, 1988. As part of its denial, the Division suspended the award of the QS, pending review on appeal.

Appellant maintains on appeal that it should receive the QS because it purchased the rights to all QS associated with the F/V BUCCANEER when it purchased the vessel and assets. Alternatively, the Appellant asserts that it is the Respondents' successor-in-interest by virtue of the vessel purchase.

DISCUSSION

This appeal is governed by our decisions in Cadden v. Levenhagen and Pugh and Prowler Partnership v. Samuelson.⁵ The Appellant in Cadden asserted that he should receive the credit for landings made

⁴The agreement read: "OSP and PAINTER hereby sell and convey to ALWERT, their undivided one-half (1/2) interest (an undivided 1/4 each) in the documented fishing vessel BUCCANEER, Official Number 558467 and related fishing gear, a 1979 Chevrolet Boom Truck, Serial Number C16DA9V1154507, a forklift, a gear shed and land more particularly described in Exhibit "A" and all other tangible assets owned by the parties in common and used in the operation of the fishing vessel BUCCANEER and gear shed, except intangible assets of the partnership, including cash and receivables, hereinafter sometimes called "ASSETS".

⁵Cadden v. Levenhagen and Pugh, Appeal No. 95-0013, January 17, 1996, *aff'd* January 18, 1996; Prowler Partnership v. Samuelson, Decision on Reconsideration (Part I), Appeal No. 95-0084, March 12, 1996, *aff'd* March 14, 1996.

from a vessel by the former owners during a period before he purchased the vessel. Like the Appellant here, Mr. Cadden argued that his purchase of the vessel included any fishing history and fishing rights that went with the vessel. He also argued that by purchasing the vessel, he became the sellers' successor in interest and, therefore, was eligible to receive the initial issuance of QS that would otherwise go to them. In Prowler, the Appellant likewise argued that, by purchasing the Respondent's interests in the vessel and the partnership, the Appellant had purchased the right to receive the Respondent's initial issuance of QS. The Appellant argued alternatively that the purchase had made it the successor in interest to the Respondent.

In both cases, this office concluded that the IFQ regulations do not provide for assignments of initial QS eligibility, and that the transfer of a vessel does not transfer eligibility for the initial issuance of QS. We also concluded that to be a successor in interest under 50 C.F.R.

§ 676.20(a)(1), one must succeed to a qualified person's entire interest, not merely the person's interest in the vessel. In this appeal, therefore, both of the Appellant's arguments must fail. The sale of the Respondents' interests in the F/V BUCCANEER did not transfer to the Appellant the Respondents' eligibility for initial issuance of QS. Nor did the sale make the Appellant a successor in interest to the Respondents because the Respondents are still in existence and, therefore, do not have any successors.

As to what rights and interests may have been transferred when the Respondents sold their interest in the F/V BUCCANEER to the Appellant, that is not for this office to decide. The Division is not bound by the terms of a private vessel sales agreement, nor is it the Division's duty to interpret and enforce such contracts. The Appellant must look to another forum to enforce any contractual rights it may have as a result of the sales agreement.

CONCLUSIONS OF LAW

1. The Respondents cannot and did not assign to the Appellant their eligibility for the initial issuance of QS.
2. The Appellant is not a successor-in-interest of the Respondents for purposes of eligibility for the initial issuance of QS under 50 C.F.R. 676.20(a)(1).

DISPOSITION AND ORDER

The Division's Initial Administrative Determination denying the Appellant's claim to qualifying pounds landed from the F/V BUCCANEER between January 1, 1984, and May 1, 1988, is **AFFIRMED**. The Division is **ORDERED** to remove the suspension on the use and transferability of QS issued to OSP and Dorothy L. Painter. This decision takes effect April 22, 1996, unless by that date the Regional Director orders review of it.

Robin L. Tuttle
Appeals Officer

I concur in the factual findings of this decision and I have reviewed this decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

Because the prevailing parties in this appeal, Oregon Seafood Producers and Dorothy L. Painter, can still receive QS and the corresponding IFQ for the 1996 season, I recommend that the Regional Director 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.

Edward H. Hein
Chief Appeals Officer