

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 95-0085
)	
STEVEN J. EIKE,)	DECISION
Appellant)	
_____)	August 1, 1996

STATEMENT OF THE CASE

Appellant Steven J. Eike, filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on May 1, 1995. The IAD denied Mr. Eike's application¹ for Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut because it was not filed by the July 15, 1994 application filing deadline. Mr. Eike 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 there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered. 50 C.F.R. § 676.25(g)(2)-(3).²

ISSUE

Whether NMFS should accept the Appellant's application as timely filed.

BACKGROUND

On or about December 20, 1993, the Division mailed documents explaining the process for applying for QS and an RFA form to Mr. Eike at the last address known to the Division, an address in Cordova, Alaska. Those documents were returned to the Division as undeliverable on or about January 31, 1994. The Division sent the documents to the same address a second time on or about April 20, 1994 and they were returned to the Division on or about May 2, 1994 with a stamp indicating that the forwarding had expired.

Mr. Eike's appeal materials state that as soon as he learned of the IFQ application process from a

¹The document at issue is entitled "Request for Application" [RFA]. An RFA is the equivalent of an application for the meeting of the application filing deadline under the IFQ program. See, Keith A. Buehner, Appeal No. 94-0001, September 26, 1994, *aff'd* March 2, 1995.

²This Decision is based on the regulations in effect at the time the RFA was filed. Since that date, the numbering of certain regulations has changed. However, there have not been any changes material to the issues in this appeal.

friend, he telephoned the Division on April 19, 1995, -- nine months after the filing deadline -- and requested another RFA packet. The RFA materials were resent to him on or about April 19, 1995. Mr. Eike signed the RFA and sent it to the Division in an envelope postmarked Seattle, Washington, April 26, 1995. The Division received the RFA on April 28, 1995.

On appeal, Mr. Eike acknowledges that his application was filed late, but he states that this was only because the United States Postal Service did not properly forward the application to his new address, which he states was on file with the Cordova, Alaska, post office. Mr. Eike submitted as evidence the form for his registration of his post office box in Cordova. The form shows payment for the box for several years. The last payment was made May 30, 1992, and the form indicated that the next payment would be due April 1, 1993. It is not clear from the record when Mr. Eike filed a forwarding notice with the United States Postal Service. However, the evidence establishes that Mr. Eike did not receive the RFA mailings sent to his Cordova, Alaska, post office box address, the address last known by the Division.

In December, 1991, the North Pacific Fishery Management Council decided to adopt the IFQ program for halibut and sablefish.³ On December 3, 1992, proposed regulations for the IFQ program were published in the Federal Register. 57 Fed. Reg. 47,234 (1992). On November 9, 1993, final IFQ rules were published in the Federal Register. 58 Fed. Reg. 59,375 (1993). On January 6, 1994, the first official notice of the application period and deadline for filing applications under the IFQ program was published in the Federal Register. 59 Fed. Reg. 701 (1994). This notice was the "first legally sufficient notice of the application filing deadline. . ."⁴ In addition to publication in the Federal Register, the Division carried out an extensive campaign to publicize the IFQ Program. This effort included news releases, public service announcements, paid advertisements, media interviews, public information workshops, and presentations at public meetings.

In addition to the agency's publication of notice in the Federal Register and the Division's extensive publicity campaign, the Division also sent individualized notice of the program and RFA forms to many persons it believed might be eligible to apply for and receive QS. Those were persons listed in the Division's database as owners of vessels that made legal landings during the relevant years. Of that group, persons whose current addresses were in the Division's database would be likely to receive individualized notice of the program and the RFA form. While the Division attempted to give individualized notice to the likely eligible persons, its computer records prior to receipt of applications did not reflect those who were eligible based on leases of vessels or successors in interest to owners and lessees. Thus, large numbers of persons who submitted applications demonstrating their eligibility to receive QS never received individualized notices of the program.

³*Newsletter* (North Pacific Fishery Management Council) No. 6-91, December 19, 1991.

⁴John T. Coyne, Appeal No. 94-0012, May 24, 1996 (Decision on Reconsideration).

DISCUSSION

The regulations implementing the IFQ program provide that an application received after July 15, 1994, "will not be considered."⁶ The regulations do not require the Division to give individualized notice to every person who might be eligible to receive QS. Although the Division made extensive efforts to reach those who might be eligible, the regulations do not impose on the Division the duty to launch an investigation when mailings sent to last known addresses are returned undeliverable. Mr. Eike does not contend that the Division failed to comply with the regulations governing the IFQ program, and I must presume the legal validity of the agency's own duly promulgated regulations.⁶

Mr. Eike does not contend that the Division received his RFA or that he mailed or telefaxed his RFA by July 15, 1994. Accordingly, the only way the Division could accept the RFA is if the filing period is equitably tolled.⁷ In only one case has an applicant's RFA delivered after the July 15, 1994 deadline been accepted as timely under the equitable tolling doctrine.⁸

The Coyne decision found that the July 15, 1994 deadline was not jurisdictional in nature, and that the doctrine of equitable tolling could apply under proper circumstances. It stated:

Courts have used a variety of formulations to describe the nature of the circumstances that trigger equitable tolling. Usually the courts require extraordinary circumstances beyond the applicant's control that prevented the applicant from filing in a timely manner. [footnote omitted]. These include circumstances such as mental incompetence, chronic alcoholism, minority, war, acts of god, misconduct by an opposing party, and the failure of a government agency to provide statutorily required individual notice. [citation omitted] What all of these types of circumstances have in common is that they cause the applicant, for all or part of the application period, to be physically, mentally, emotionally, or legally unable to apply, or to be ignorant of the right or requirements of application and, thereby, effectively unable to apply.

In Coyne, the applicant "was placed in an unusually isolated environment as a result of his addiction to

⁵59 Fed. Reg. 701, at 702 (1994).

⁶George M. Ramos, Appeal No. 94-0008, Regional Director's Decision on Review, at 4, April 21, 1995; Charles J. Petticrew, Appeal No. 95-0008, July 3, 1996.

⁷John T. Coyne, Appeal No. 94-0012, May 24, 1996 (Decision on Reconsideration).

⁸*Id.*

heroin." Mr. Coyne entered a treatment facility under the threat of imprisonment if he did not do so. He had been addicted to heroin for approximately three years. The Chief Appeals Officer found that Mr. Coyne's "heroin addiction and the resultant isolation in the . . . treatment program were extraordinary circumstances beyond his control that prevented him from learning of the IFQ application period and applying before the deadline expired." [footnote omitted].

I find that, in contrast to Coyne, Mr. Eike did not suffer any disability or circumstance beyond his control that effectively prevented him from timely applying for the IFQ program. There was nothing extraordinary about Mr. Eike's circumstances. Mr. Eike's appeal is based solely on the fact that he did not receive an RFA in the mail, as it was not forwarded to his Seattle address.

There is nothing extraordinary about the fact that Mr. Eike did not receive mail at a post office box address he had vacated. The Division sent information about the application process and RFA forms to individuals it believed might be eligible at the last address known to the Division. Second notices were sent by first class mail, which may be forwarded to addresses on file with the United States Postal Service, until the forwarding notice expires (generally after one year). Obviously, if an individual moves leaving no forwarding address with the United States Postal Service, or if the forwarding address has expired, or if for any other reason the RFA materials fail to arrive by mail, the individual is simply in the same position as the many other eligible persons who had to learn of the program and application requirements through means other than individualized notice. Equitable tolling of the filing deadline is inapplicable when the appellant can show only that he did not receive individualized notice of the program and an unsolicited RFA form.

FINDINGS OF FACT

1. Steven Eike's request for application was mailed to the Division in an envelope postmarked April 26, 1995.
2. Steven Eike did not receive individualized or actual notice of the application procedure or an RFA form prior to the July 15, 1994 deadline.
3. Steven Eike did not suffer any disability or extraordinary circumstance that prevented him from timely applying for the IFQ program.

CONCLUSIONS OF LAW

1. The doctrine of equitable tolling does not apply to the IFQ application period in this case.
2. Steven Eike's request for application was not timely filed.

Appeal No. 95-0085
August 1, 1996

DISPOSITION

The Division's IAD denying the Appellant's application as untimely filed is **AFFIRMED**. This decision takes effect September 3, 1996, unless by that date the Regional Director 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 10 days after the date of this decision, August 12, 1996.

Rebekah R. Ross
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.

Randall J. Moen
Appeals Officer