

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 96-0002
)	
THOMAS W. MITTENEN,)	DECISION
Appellant)	
_____)	January 22, 1999

STATEMENT OF THE CASE

Appellant Thomas Mittenen filed a timely appeal of an Initial Administrative Determination [IAD] issued on December 14, 1995, by the Restricted Access Management [RAM] program.¹ The IAD denied Mr. Mittenen's request for Pacific halibut and sablefish quota share [QS] under the Individual Fishing Quota [IFQ] program because he did not make a timely claim for QS, and because he did not provide sufficient evidence of QS. Mr. Mittenen has adequately shown that his interest is directly and adversely affected by the IAD.

Mr. Mittenen's appeal is divided into two separate appeals. This appeal addresses whether Mr. Mittenen can qualify for halibut or sablefish QS based on the lease or ownership of the F/V MARGARET G in 1988 and 1989; and if he can, whether he can receive IFQ credit and resultant QS for the landings of halibut from the F/V MASONIC in 1984, as a former shareholder of a dissolved corporation, Wesfisco, Inc. This appeal also addresses whether Mr. Mittenen timely claimed that he leased the F/V MARGARET G in 1989, the F/V SALTY III, and the F/V PARAGON II. Mr. Mittenen's other appeal (Appeal No. 98-0001) addresses whether he can receive halibut QS, based on the lease of the F/V ESKIMO PRINCESS in 1986.

On May 26, 1998, a hearing was held to determine whether Mr. Mittenen leased the F/V MARGARET G in 1988 and 1989. The record was closed December 21, 1998.

In this decision, I conclude that Mr. Mittenen timely claimed that he leased the F/V MARGARET G in 1989, that he qualifies for an initial issuance of halibut QS, based on his equitable and beneficial ownership of the F/V MARGARET G in 1989, and that he should receive additional halibut QS as a successor-in-interest to the owner of the F/V MASONIC in 1984. I also conclude that Mr. Mittenen does not qualify for an initial issuance of sablefish QS, based on a claimed lease of the F/V MARGARET G in 1988, because the sablefish landings made from the vessel that year were not "legal landings" for IFQ purposes. I further conclude that Mr. Mittenen did not timely claim that he leased the F/V SALTY III and the F/V PARAGON and that as a consequence those claims cannot be

¹The Restricted Access Management Division was renamed Restricted Access Management program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

considered on appeal.

ISSUES

1. Did Mr. Mittenen submit timely claims that he leased the F/V MARGARET G in 1989, the F/V SALTY III in 1987, and the F/V PARAGON II in 1990?
2. Is the affidavit of Mr. Mittenen and Mr. Hofman conclusive evidence of a vessel lease of the F/V MARGARET G in 1988 and 1989?
3. Does Mr. Mittenen qualify for sablefish QS based on landings made from the F/V MARGARET G in 1988?
4. Can Mr. Mittenen qualify for halibut QS based on the lease or purchase of the F/V MARGARET G in 1989?
5. Can Mr. Mittenen receive halibut QS based on the halibut landings made from the F/V MASONIC in 1984, as a former shareholder of a dissolved corporation, Wesfisco, Inc.?

BACKGROUND

Mr. Mittenen claimed on his Request for Application [RFA] for QS that he leased the F/V MARGARET G between May and October, 1988. Two months after the 90-day deadline, Mr. Mittenen informed RAM that he also leased the vessel in 1989.²

RAM's records show that the F/V MARGARET G: (1) was owned by Cruzan Fisheries, Inc. between 1987 and 1991; (2) made landings of sablefish on April 28, 1988, April 30, 1988, May 3, 1988, and August 10, 1988; and (3) made one landing of halibut on September 11, 1989.³

The vessel's 1988 landings were made on Mr. David Dowie's fishing permit, who died aboard the vessel in the South Seas in April 1989. The vessel's 1989 halibut landing was made on Mr. Mittenen's fishing permit.

To prove he leased the vessel in 1989, Mr. Mittenen submitted a purchase agreement for the vessel, signed April 24, 1989, by Mr. Mittenen, as buyer, and Mr. Dale Hofman, as seller, on behalf of Cruzan

²See, the September 12, 1995 letter to RAM from Mr. Mittenen's attorney, Joe Sullivan.

³See, RAM's Official Record. The F/V MARGARET G is listed as the F/V "NOR CROWN" in the Official Record. According to the records of the State of Alaska Commercial Fisheries Entry Commission, the vessel was renamed the F/V NOR CROWN in 1991 and the F/V ZOLOTI in 1993. The registered owner of the vessel was Cruzan Fisheries, Inc., between 1988 and 1993.

Fisheries, Inc.

In a written IAD, RAM found Mr. Mittenen failed to timely claim and to provide sufficient evidence of his eligibility for halibut QS and sablefish QS.

On appeal, Mr. Mittenen claimed he had a "lease/purchase arrangement" for the F/V MARGARET G with Cruzan Fisheries, Inc., between March 1, 1988 and September 1, 1991. The claim was made pursuant to an affidavit of a lease signed by Mr. Mittenen and Mr. Hofman of Cruzan Fisheries, Inc. In another affidavit, Mr. Mittenen referred to the arrangement as a "lease/purchase option."⁴ We ordered Mr. Mittenen to produce additional evidence that he leased the vessel.

During the course of this appeal, we received state and federal documents, which were inconsistent with the affidavits produced by Mr. Mittenen. The documents also showed that an ADF&G⁵ intent to operate was not filed for the F/V MARGARET G in 1988, and that the state fish tickets for the vessel's 1988 landings were incomplete, with three of the four fish tickets untimely filed. Mr. Mittenen was ordered to produce evidence that legal landings of halibut and sablefish were made from the vessel in 1988.

An oral hearing was held to determine whether the affidavits submitted by Mr. Mittenen were credible. Mr. Mittenen was ordered to produce for the hearing any additional evidence that would show he leased the vessel during the QS qualifying period (1988, 1989, or 1990).

During the hearing, Mr. Mittenen and Mr. Hofman testified that Mr. Mittenen leased the F/V MARGARET G in 1988 and that they had a lease/purchase arrangement for the vessel in 1989.

After the hearing, Mr. Mittenen was ordered to produce evidence to support his assertions at the hearing that he was aboard the F/V MARGARET G, and was the master of the vessel, at the time of the vessel's landings in 1988.

Mr. Mittenen also claimed on his RFA that he was eligible for QS as a former shareholder of a dissolved corporation, Wesfisco, Inc.

The U.S. Coast Guard abstract of title for the F/V MARGARET G shows that Wesfisco, Inc., owned the vessel between June 22, 1981, and October 1984. RAM's records show that landings of halibut

⁴The affidavit is entitled "Exhibit D, Affidavit of Thomas W. Mittenen," and was signed by Mr. Mittenen on December 30, 1997. The affidavit cannot be used as conclusive evidence of a vessel lease because the document is not signed by the owner of the vessel.

⁵The state of Alaska Department of Fish and Game.

were made from the vessel in June and July of 1984. No one else claimed IFQ credit for these landings.

Mr. Mittenen was ordered to produce evidence showing that Wesfisco, Inc. was dissolved, and that he was the sole owner and successor to the interests of the corporation at the time of dissolution. Wesfisco, Inc., was incorporated in the state of Washington.

After Mr. Mittenen filed his appeal, he claimed for the first time that he also had leased the F/V SALTY III in 1987 and the F/V PARAGON II in 1990.

DISCUSSION

To qualify 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 in a QS qualifying year (1988, 1989, or 1990).⁶ A qualified person's halibut QS is based on the five best years of legal landings of halibut made from vessels owned or leased by that person during the period 1984-1990.⁷ A qualified person's sablefish QS is based on the five best years of legal landings of sablefish made from vessels owned or leased by that person during the period 1985-1990.⁸

1. Did Mr. Mittenen submit timely claims that he leased the F/V MARGARET G in 1989, the F/V SALTY III in 1987, and the F/V PARAGON II in 1990?

In Tiger, Inc.,⁹ we ruled that claims made on an RFA are part of an applicant's application for QS, and are deemed to have been made in a timely manner if the RFA was timely filed. We also ruled in that case that claims made for the first time after the 90-day response deadline¹⁰ are untimely and will not be considered on appeal. In our reconsideration of Tiger, Inc.,¹¹ we ruled that an applicant who failed to correct or notice a problem on an application for QS or a Quota Share Data Summary, even if that

⁶See, 50 C.F.R. § 679.40(a)(2).

⁷See, 50 C.F.R. § 679.40(a)(4)(i).

⁸See, 50 C.F.R. § 679.40(a)(4)(ii).

⁹Appeal No. 95-0100, February 26, 1996, *aff'd* March 4, 1996.

¹⁰See, IFQ regulation 50 C.F.R. § 679.40(a)(7), which provides in relevant part that an applicant for QS has 90 days to challenge the information in the applicant's application for QS or in the QS Data Summary.

¹¹Appeal No. 95-0100, Decision on Reconsideration, February 26, 1996, *aff'd* March 4, 1996.

failure constituted a careless mistake, can still seek to correct that mistake on appeal, as long as the applicant made a timely claim and filed a timely appeal.

F/V MARGARET G

Mr. Mittenen changed the form on his RFA to read that he had leased the F/V MARGARET G only in 1988, between May 1988, and the date of the vessel's sale and return, October 1988.¹²

The evidence shows that the sale and return of the F/V MARGARET G could not have happened in October 1988, but sometime in late 1989. The purchase agreement shows the sale of the vessel occurred April 24, 1989, and RAM's landing records show Mr. Mittenen landed halibut from the vessel on September 11, 1989. Thus, the lease claim on his RFA should have included 1989.

Mr. Mittenen did not inform RAM until two months after the 90-day deadline that he had leased the vessel in 1989. RAM, in effect, treated the claim as a "new claim," and rejected the claim as untimely.

I find that the claim made by Mr. Mittenen after the 90-day deadline was not a new claim, but an effort to address an inadvertent mistake that occurred in the filing of the original claim on his RFA. In light of this, Mr. Mittenen's 1989 lease claim can be considered on appeal for purposes of QS.

F/V SALTY III and F/V PARAGON II

There is no evidence in the record that Mr. Mittenen informed RAM, by the 90-day response deadline, that he leased or owned the F/V SALTY III or the F/V PARAGON. His claims regarding these vessels were made for the first time on appeal and were not reasonably raised by any claims he made to RAM. In light of this, Mr. Mittenen's claims that he leased the F/V SALTY III and the F/V PARAGON II were not timely made and cannot be considered on appeal for purposes of QS.

2. Is the affidavit of Mr. Mittenen and Mr. Hofman conclusive evidence of a vessel lease of the F/V MARGARET G in 1988 and 1989.

Under the regulations of the IFQ program, a written vessel lease agreement, or notarized statement from the vessel owner and lease holder attesting to the existence of a vessel lease agreement at any time during the QS qualifying years, is conclusive evidence of a lease. A notarized affidavit of a vessel lease must identify the leased vessel, the name of the lease holder, and the period of time during which the

¹²Mr. Mittenen submitted FORM D of his RFA as his claim for QS. "FORM D" is a vessel information form that requires the applicant to provide the "Vessel Purchase Date," and "If sold, [the] date of sale." Mr. Mittenen substituted "Lease" for "Purchase," and "returned" for "sold." In doing so, he claimed that he had leased the vessel between May 1988 and the date of sale and return of the vessel, October 1988.

lease was in effect.¹³ Other evidence, which may not be conclusive, but which tends to support the existence of a vessel lease, may also be submitted.¹⁴

Mr. Mittenen produced a notarized affidavit signed by himself and Mr. Dale Hofman, on behalf of Cruzan Fisheries, Inc., attesting to a lease/purchase arrangement of the F/V MARGARET G.

In the affidavit,¹⁵ Mr. Hofman states:

"from March 1, 1988 to September 1, 1991 Tom Mittenen had full control and responsibility for the operation and fishing of the F/V Margaret G pursuant to a lease/purchase arrangement we had. On April 24, 1989, we reduced our purchase agreement to the attached writing. As it turned out, Tom did not purchase the vessel, but continued to operate it on a lease arrangement. ... My only involvement with the vessel from March 1, 1988 - September 1991 was to have insurance I paid for prior to our agreement lap over into part of the first year but thereafter the vessel was completely Tom's responsibility."

On its face, the affidavit meets the regulatory requirements of a vessel lease. The affidavit is notarized and signed by the vessel owner and claimed lease holder, and identifies the name of the lease holder, the name of the leased vessel, and the period of time the lease was in effect. When an affidavit on its face satisfies the regulatory requirements of a vessel lease, the affidavit is considered *conclusive* evidence of a vessel lease. This assumes, however, that the affidavit is credible. Where evidence in the record is inconsistent with an affidavit, an appeals officer should not accept the affidavit on its face, and should look beyond the four corners of the document to determine whether the affidavit is credible. If, after considering all of the evidence, the appeals officer finds that the affidavit is not truthful or credible, the affidavit will not be accepted as conclusive evidence.

Several pieces of evidence in the record were inconsistent with the affidavit. The evidence suggested that: (1) Mr. Dowie had leased the vessel in 1988; (2) Mr. Mittenen had purchased the vessel in April 1989; and (3) Mr. Mittenen was a hired skipper, not a lessee, of the vessel in 1990 and 1991. The evidence in the record showed that:

Mr. Mittenen claimed on his RFA that he had leased the F/V MARGARET G between May and October 1988;

¹³See, 50 C.F.R. § 679.40(a)(3)(iii).

¹⁴Id.

¹⁵See, the document entitled "Owner's Verification of Lease," signed by Mr. Mittenen and Mr. Hofman on November 14, 1997.

the F/V MARGARET G was operated by Mr. David Dowie, while fishing for tuna in the South Seas during late 1988 and early 1989;

all of the vessel's 1988 landings were made on Mr. David Dowie's fishing permit;

Mr. David Dowie was charged by the state of Alaska with the illegal operation and processing of fish in April and May 1988, as the vessel's operator;

Mr. Mittenen and Mr. Hofman signed a purchase agreement for the vessel on April 24, 1989;

Mr. Mittenen filed a lien against the vessel for wages earned in May 1990 and April 1991;

Mr. Hofman claimed in his deposition (August, 1990) that Mr. Dowie operated the F/V MARGARET G in 1988 until the time of his death (April 30, 1989);

Mr. Hofman's lawyer (Michael White) claimed in a court filing in 1990 that Cruzan Fisheries, Inc., leased the vessel to Mr. David Dowie for the 1988 fishing season.

Because the evidence in the record was inconsistent with the affidavit, we held an oral hearing to assess the affidavit's credibility. The testimony at the hearing served only to discredit the affidavit.

At the hearing, Mr. Mittenen testified that: (1) he did not lease the F/V MARGARET G continuously between 1988 and 1991; (2) he did not lease the vessel at the time the vessel was in the South Seas (late 1988 through April 1989); (3) he signed a purchase agreement for the vessel on April 24, 1989, which was in effect at the time of the halibut landing in September 11, 1989; (4) he paid Cruzan Fisheries, Inc., two quarterly installments for the purchase of the vessel, with two checks for \$20,000 and \$50,000; (5) he did not fish for halibut or sablefish, nor lease the F/V MARGARET G, in 1990 or 1991; and (6) he and Mr. Hofman mutually terminated the purchase agreement in November or December, 1989.

Mr. Hofman testified that: (1) there were "pockets of time" during which the vessel was not leased to Mr. Mittenen; (2) he leased the F/V MARGARET G to Mr. David Dowie during the period the vessel was in the South Seas; (3) the purchase agreement with Mr. Mittenen was in effect from April 1989 until virtually the end of the 1989 season; (4) two quarterly installments were paid by Mr. Mittenen under the purchase agreement; (5) he and Mr. Mittenen called off the purchase agreement in late 1989, some time after the September 11, 1989 halibut landing, due to litigation surrounding Mr. Dowie's death aboard the vessel in the South Seas; (6) if he had drafted the affidavit he would have specified that the lease was not continuous, but broken into several periods; and (7) the vessel was leased to

other persons during the period of time claimed in the affidavit.¹⁶

After assessing all of the evidence, I conclude that the affidavit is not credible, and that it cannot be used as conclusive evidence of a lease.

3. Does Mr. Mittenen qualify for sablefish QS based on landings made from the F/V MARGARET G in 1988?

To be considered a "legal landing" under the regulations of the IFQ program, the halibut or sablefish must have been harvested with fixed gear and landed in compliance with the state and federal regulations in effect at the time of the landing.¹⁷ Evidence of a "legal landing" is limited to documentation of state fish tickets or federal catch reports that indicate the amount of halibut or sablefish harvested, the IPHC regulatory area or groundfish reporting area in which it was caught, the vessel and gear type used to catch it, and the date of harvesting, landing, or reporting.¹⁸

Under the state of Alaska regulations in 1988, persons or companies that caught and processed fish were required before operating to file an intent to operate with ADF&G,¹⁹ and to keep a record of the landing of fish on ADF&G fish tickets.²⁰ The Alaska regulations required the state fish tickets to be submitted to ADF&G at least once a week or as otherwise specified by ADF&G for each particular

¹⁶Mr. Hofman testified that he leased the vessel to David Dowie for tuna fishing from the fall of 1988 into the spring of 1989; John Miller for six weeks of crab fishing during the winter of 1990; and Jim Foliart for crab fishing between May and June of 1990.

¹⁷See, 50 C.F.R. § 679.40(a)(3).

¹⁸See, 50 C.F.R. § 679.40(a)(3)(v)(B).

¹⁹See, 05 AAC 039.130(a), which provides: "(a) A person, company, firm, or other organization who is the first purchaser of raw fish, or who catches and processes fish or byproducts of fish, or who catches and has fish or byproducts of fish processed by another person or company, shall:

(1) furnish to the department each calendar year before operating, a written intent to operate with a description of the nature, extent, and location of the operation on forms available from the department: forms will not be processed and fish tickets will not be issued without certification that surety bonds as required by AS 16.10.290 - 16.10.296 have been posted with the Commissioner of Labor and that a valid Alaska Business License or Fisheries Business License has been issued by the Department of Revenue;"

²⁰See, 05 AAC 039.130(b).

area and fishery.²¹ The following information was required on state fish tickets:²²

(1) the name of the individual or company buying the fish, the processor code assigned to each buyer by the department, and the signature of the buyer or his representative;

(2) the full name and signature of the permit holder;

(3) the name or the Coast Guard number of the vessel employed in taking the fish;

(4) the date of the landing of the fish;

(5) the fisherman's five-digit CFEC permit serial number, imprinted on the fish ticket from the fisherman's valid permit card at the time of delivery only, (unless the permit card has been lost, transferred, or destroyed, and in that case, the buyer or fisherman may write the permit number on the fish ticket at time of delivery only);

(6) the type of gear by which the fish were taken;

(7) the statistical area in which the fish were taken; and

(8) the amount of pounds of fish landed.

Vessels that processed fish were also required to have an Alaska Department of Environmental Conservation [ADEC] seafood processor's permit.²³

Under the federal regulations in 1988,²⁴ the operator of a fishing vessel (including a catcher/processor

²¹Id.

²²Id.

²³See, 18 AAC 034.020, which provides in relevant part: "An establishment or vessel that processes fisheries products may not operate without a current annual permit issued by the department. The department will issue a permit if the establishment or vessel demonstrates that it can operate in compliance with this chapter and has paid the applicable fee set out at 18 AAC 34.905. An establishment or vessel shall comply with the terms of its permit."

²⁴See, 50 C.F.R. § 672.5, which reads in relevant part:

(a) Catcher vessels -- (1) the operator of any fishing vessel (including catcher/processor vessels) to which a permit has been issued under § 672.4 of this part, that catches groundfish in any of the Gulf of

vessel) that caught sablefish in any of the Gulf of Alaska regulatory areas, the territorial sea adjacent to any regulatory area, or internal waters of the state of Alaska, was required to submit an accurately completed state of Alaska fish ticket to ADF&G within one week after the sale or delivery of the fish to shore.

RAM's records show landings of sablefish were made from the F/V MARGARET G on April 28, April 30, May 3, and August 10, of 1988.

ADF&G's records show that an ADF&G intent to operate was not filed for the vessel as of June 23, 1988.²⁵ (In addition, state of Alaska records show that an ADEC seafood processor's permit was not filed for the vessel until May 26, 1988;²⁶ and that Cruzan Fisheries, Inc., had not acquired an Alaska Fisheries Business license for the vessel, as of June 23, 1988,²⁷ or a surety bond for the vessel, as of

Alaska regulatory areas, the territorial sea adjacent to any regulatory area, or internal waters of the State of Alaska, will be responsible for the submission to ADF&G of an accurately completed State of Alaska fish ticket or an equivalent fish ticket. ...

(i) When to submit fish tickets.

(A) Sales of deliveries to shore. Except as provided by paragraph (a)(1)(ii) of this section, the operator of any fishing vessel who sells or delivered his catch of groundfish to shore must submit the fish ticket required under paragraph (a)(1) of this section within one week after such fish are sold or delivered.

(B) Sales or deliveries to vessels. Except as provided by paragraph (a)(1)(ii), the operator of any fishing vessel who sells or delivers his catch of groundfish to another vessel must submit the fish ticket required under (a)(1) of this section within one week after he returns to port.

(ii) At the election of the fishing vessel operator who catches groundfish, fish tickets may be prepared, and submitted under paragraph (a)(1)(i)(A) of this section to ADF&G by the shore-based purchaser within one week after such fish are received by the purchaser, or, if submitted under paragraph (a)(1)(i)(B) of this section, to ADF&G by the vessel-based purchaser within one week after such purchaser returns to shore. ...

²⁵See, Statement of Record Search and Findings, by Carmine DiConstanzo, Supervisor, Computer Services Section, Division of Commercial Fisheries, Alaska Department of Fish and Game, June 24, 1988, which provides that the vessel had yet to be licensed (for the year) as of that date.

²⁶See, the Seafood Processors Permit Application, signed by Dale Hofman, of Cruzan Fisheries, filed with ADEC, May 26, 1988.

²⁷See, Certification on Nonexistence of Record, by John M. Hansen, Office Audit Supervisor Income & Excise Audit Division, State of Alaska, June 23, 1988 [50].

June 21, 1988).²⁸

In Weber v. Kochuten,²⁹ we ruled that the definition of "legal landing" requires compliance only with state and federal regulations that govern commercial fishing in the federal Pacific halibut and sablefish fisheries in an off Alaska, and the landing of fish harvested from those fisheries; and that these include regulations specific to those fisheries, as well as general commercial fishing regulations applicable to participation in those fisheries.

Although the focus of the ADF&G intent to operate regulation is on processing, in the context of a catcher/processor vessel the "operation" includes both the catching and processing of fish. The purpose of requiring the filing of an intent to operate "each calendar year before operating" is to enable the state to better monitor the activities of catcher/processor vessels. These vessels pose a particular threat to commercial fisheries regulation because of the ease in which they can catch fish, process it, and escape or avoid the state's jurisdiction by, say, landing in Washington state or offloading to a foreign mothership in outside waters. The ADF&G intent to operate regulation is a state commercial fishing regulation that requires compliance in order for the landing of sablefish to be considered a "legal landing" for purposes of QS. Thus, failure to file an ADF&G intent to operate before catching and processing sablefish aboard a catcher/processor vessel renders a landing of the sablefish an unlawful landing for purposes of QS.

On September 16, 1988, a judgment was entered against Cruzan Fisheries, Inc., by the Alaska District Court in Kodiak, for failure to file an ADF&G intent to operate, as of May 25, 1988.³⁰ Cruzan Fisheries, Inc., was placed on probation for the offense until September 16, 1988.³¹ As a condition of probation, Cruzan Fisheries, Inc., was required to file "all past due fish tickets for 1988 by October 31, 1988."³²

All of the fish tickets for the 1988 landings of the vessel contain missing information. Three of the four fish tickets (for the landings of April 28, April 30, and August 10) are not signed by the fish buyer and list the weight of the fish in whole numbers to the nearest 1,000 pounds. The three fish tickets were

²⁸See, Attestation of Official Record, by James Sanwick, Division of Labor Standards & Safety, State of Alaska, June 21, 1988 [50].

²⁹See, Weber v. Kochuten, Appeal No. 95-0122, June 18, 1996, at 7.

³⁰See, the Judgment against Cruzan Fisheries, Inc., by Judge Anna M. Moran, in the District Court for the State of Alaska at Kodiak, September 16, 1988.

³¹Id. at 2.

³²Id.

received by ADF&G on October 27, 1988,³³ several months after the landing of the fish.

I shall now discuss whether each landing is a "legal landing" for purposes of QS.

The April 28, 1988 landing

ADF&G records show that an ADF&G intent to operate was not filed with the state of Alaska for the F/V MARGARET G before the landing of April 28, 1988. The evidence also shows that Cruzan Fisheries, Inc., was convicted of failing to file an ADF&G intent to operate before catching and processing this fish.

The fish ticket for the landing (#G88 - 002855) does not have the fisherman's CFEC permit number, the ADF&G vessel registration number, the processor's code number, and the name and signature of the fish buyer. The fish ticket was not submitted to ADF&G until October 27, 1988, six months after the date of the claimed landing. The weight of the sablefish on the fish ticket is listed at 15,000 and 21,000 pounds, which indicates these were estimated weight, not the scale weight.

Cruzan Fisheries, Inc.'s conviction for failure to file an ADF&G intent to operate, the absence of information on the state fish ticket, and the delay of submission of the fish ticket, show the landing of April 28, 1988, was not made in compliance with state of Alaska regulations. The delay of submission of the fish ticket was also not in compliance with federal regulations. Consequently, I conclude the claimed landing is not a "legal landing" for purposes of QS.

The evidence also shows that the fish ticket is not credible evidence of a legal landing. The absence of the fish buyer's signature, and listing of the weight of the fish in whole numbers, to the nearest 1,000 pounds, call into question the accuracy of the fish weight, and the date of the landing and reporting of the fish. In light of this, I conclude the state fish ticket is not credible, and cannot be used as evidence of a legal landing by Mr. Mittenen or anyone else.

The April 30, 1988 landing

The evidence in the record shows that an ADF&G intent to operate was not filed for the F/V MARGARET before the landing of April 30, 1988. The evidence also shows that Cruzan Fisheries, Inc., was convicted of failing to file an ADF&G intent to operate before catching and processing this fish.

The state fish ticket (#G88 - 002854) for the landing of April 30, 1988, does not have the vessel's name, the fisherman's CFEC permit number, the processor's code number, the fisherman's signature, and the name and signature of the person buying the fish. The fish ticket was not submitted to ADF&G

³³See, the Rapifax Transmittal Sheet, to Mr. David Dowie, c/o Cruzan Fisheries, Inc., from Leslie Datson, state of Alaska, October 27, 1988 [14].

until October 27, 1988, six months after the claimed landing of the fish. The weight of the sablefish listed on the state fish ticket is 21,000 and 9,000 pounds.

Cruzan Fisheries, Inc.'s failure to file an ADF&G intent to operate, the absence of information on the state fish ticket, and the delay of submission of the fish ticket, show the landing of April 30, 1988, was not made in compliance with state of Alaska regulations. The delay of submission of the fish ticket was also not in compliance with federal regulations. Consequently, I conclude that the claimed landing is not a "legal landing" for purposes of QS.

The evidence also shows the fish ticket is not credible evidence of a legal landing. The absence of the fish buyer's signature, and listing of the weight of the fish in whole numbers, to the nearest 1,000 pounds, calls into question the accuracy of the fish weight, and the date of the landing and reporting of the fish. In light of this, I conclude the state fish ticket cannot be used as evidence of a legal landing by Mr. Mittenen or anyone else.

The May 3, 1988 landing

The evidence in the record shows that an ADF&G intent to operate was not filed for the F/V MARGARET G before the landing of May 3, 1988. The evidence also shows that Cruzan Fisheries, Inc., was convicted of failing to file an ADF&G intent to operate before catching and processing this fish.

The state fish ticket (#G88 - 002854) for the landing of May 3, 1988, is not signed by the holder of the CFEC permit number listed on the fish ticket. The fish ticket is signed by Gary Hall.

Cruzan Fisheries, Inc.'s failure to file an ADF&G intent to operate and the absence of information on the state fish ticket, show that the landing of May 3, 1988, was not made in compliance with state of Alaska regulations. Therefore, I conclude the claimed landing is not a "legal landing" for purposes of QS.

The evidence also shows the fish ticket is not credible evidence of a legal landing. The fish ticket is not signed by the holder of the fishing permit. The absence of the signature of the holder of the fishing permit calls into question the location and date of the harvest of the fish, and gear type used to harvest the fish. In light of this, I conclude the state fish ticket cannot be used as evidence of a legal landing by Mr. Mittenen or anyone else.

The August 10, 1988 landing

The state fish ticket (#G88 - 002853) indicates that the sablefish were harvested by the F/V MARGARET G on May 20, 1988, but not landed until August 10, 1988. The evidence shows that a state of Alaska ADF&G intent to operate was not filed for the F/V MARGARET G before the fish

were harvested and processed.³⁴ The evidence also shows that Cruzan Fisheries, Inc. was convicted of failing to file an ADF&G intent to operate before catching and processing this fish.

The fish ticket does not have the vessel's name, the fisherman's CFEC permit number, the processor's code number, and the name and signature of the person buying the fish. The fish ticket was filed nearly three months after the claimed landing. The weight of the sablefish listed on the state fish ticket is 60,000 and 30,000 pounds.

Cruzan Fisheries, Inc.'s failure to file an ADF&G intent to operate, the absence of information on the state fish ticket, and the delay of submission of the fish ticket, show the landing of August 10, 1988, was not made in compliance with state of Alaska regulations. The delay of submission of the fish ticket was also not in compliance with federal regulations. Consequently, I conclude the claimed landing is not a "legal landing" for purposes of QS.

The evidence also shows the fish ticket is not credible evidence of a legal landing. The absence of the fish buyer's signature, and listing of the weight of the fish in whole numbers, to the nearest 1,000 pounds, calls into question the date of the landing and reporting of the fish, and the accuracy of the fish weight. In light of this, I conclude the state fish ticket cannot be used as evidence of a legal landing by Mr. Mittenen or anyone else.

Conclusion

The landings of the F/V MARGARET were not made in compliance with state of Alaska fishing regulations. An ADF&G intent to operate the vessel was not timely filed; the state fish tickets for the landings of the vessel were incomplete; and three of the four fish tickets were untimely filed. As a result, the landings from the F/V MARGARET G in 1988 are not legal landings for purposes of QS.

The fish ticket evidence of landings from the F/V MARGARET G in 1988 is also not credible. The fish tickets are not signed by the fish buyer or the holder of the fishing permit, and on three of the tickets the listed weight is not reliable. As a result, Mr. Mittenen does not have sufficient evidence of any legal landings of sablefish in 1988.

Thus, even if Mr. Mittenen had "leased" the F/V MARGARET G in 1988 (which I do not decide), he would not have qualified for sablefish QS because "legal landings" of sablefish were not made from the vessel during that year.³⁵

³⁴It is reasonable to find that this fish was frozen, i.e., processed, aboard the vessel very shortly after it was harvested.

³⁵There is also no evidence in the record of any halibut landings from the vessel in 1988 or 1990.

4. Can Mr. Mittenen qualify for halibut QS based on the lease or purchase of the F/V MARGARET G in 1989?

Under the regulations of the IFQ program, evidence of vessel ownership is limited to the following documents, in order of priority: a U.S. Coast Guard abstract of title, when required; a certificate of registration that is determinative of vessel ownership; and a bill of sale.³⁶ All evidence that is relevant, material, reliable, and probative may be considered on appeal for purposes of an initial issuance of QS.³⁷

The IFQ regulations do not define what constitutes a "vessel lease," nor do they prescribe the minimum requirements for, or essential elements of, a vessel lease. Recognizing that commercial fishermen and vessel owners enter into a considerable variety of business arrangements relating to fishing operations, we have chosen not to establish a single, narrow definition of a vessel lease. Rather, we have identified seven factors that should be considered in deciding whether a vessel lease existed, when there is no written agreement.³⁸ 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 income tax and other purposes; and
- (7) whether the claimed lease had a set or guaranteed term.

³⁶See, 50 C.F.R. § 679.40(a)(3)(ii).

³⁷See, 50 C.F.R. § 679.40(j).

³⁸See, Kristovich v. Dell, Appeal No. 95-0010, March 20, 1996, *aff'd* March 27, 1996; Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996, *aff'd* September 3, 1996; and F/V Determined Partnership v. Big Blue, Appeal No. 95-0049, October 22, 1996, *aff'd* November 5, 1996.

As a guideline in weighing the factors, we stated in O'Rourke v. Riddle³⁹ that the North Pacific Fishery Management Council intended to award QS to those person who could prove an oral, and 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.⁴⁰ An "entrepreneur" is one who organizes, manages, and assumes the risks of a business venture in the expectation of gaining the profit.⁴¹

RAM's records show that halibut was landed from the F/V MARGARET G on Mr. Mittenen's fishing permit on September 11, 1989. Mr. Mittenen claims that he had a lease/purchase arrangement for the F/V MARGARET G during that time. The parties also testified to that effect.

To prove the existence of a lease/purchase arrangement, Mr. Mittenen produced the following relevant documents:

a purchase agreement for the F/V MARGARET G, signed April 24, 1989, by Mr. Mittenen and Mr. Hofman, of Cruzan Fisheries, Inc.;

his own affidavit, attesting the existence of "lease/purchase option" with Mr. Hofman for the F/V MARGARET G, from "March 1, 1988, through the end of the season in 1991";

an affidavit signed by himself and Mr. Hofman, attesting to a "lease/purchase arrangement" for the F/V MARGARET G from "March 1, 1988 to September 1, 1991";

an Alaska Pacific Seafoods [APS] fisherman's settlement report, issued April 27, 1990, in the name of "Tom Mittenen" and the "F/V MARGARET G," for the period January 1, 1989, through April 27, 1990;

Mr. Mittenen's bank statements from First National Bank of Anchorage, for October, November, and December, 1989; and

individual checks written on Mr. Mittenen's bank account at First National Bank of Anchorage, from August through December, 1989.

³⁹Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1996.

⁴⁰In several cases we have stated that the Council intended QS for persons who acted like entrepreneurs. *See, e.g., Bradley v. Padon*, Appeal No. 96-0003, January 16, 1997, at 4.

⁴¹*See*, WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 436 (1988).

The parties both testified that the purchase agreement was in effect at the time of the halibut landing (September 11, 1989).

I shall now discuss whether Mr. Mittenen qualifies for halibut QS as an owner or lessee of the F/V MARGARET G.

The purchase agreement

The purchase agreement is signed by Mr. Mittenen and Mr. Dale Hofman, on behalf of Cruzan Fisheries, Inc., as the respective "buyer" and "seller" of the F/V MARGARET G, on April 24, 1989.

Under the purchase agreement, Mr. Mittenen is required to: (1) pay Cruzan Fisheries, Inc. \$550,000 for the "purchase and sale" of the vessel, in installment payments of not less than \$25,000 each quarter, beginning July 1, 1989, including "all net proceeds" (revenues after expenses of "crew wages, fuel, groceries, bait, moorage, and insurance") from the vessel's quarterly fishing and tendering operations; (2) serve as the vessel's captain; and (3) plan and manage the vessel's day-to-day operations, including the harvesting and marketing of the fish. The quarterly installment payments are to be applied toward the purchase of the vessel, with title transferred upon payment in full. The words "lease," "lessor," "lessee," "lease/purchase," "lease/option," or "lease fee" are not found in the document.

The purchase agreement does not explicitly provide for the vessel's net proceeds to be applied toward the purchase of the vessel. It is reasonable to presume, however, that if the net proceeds were intended as "lease" payments, the purchase agreement would have so specified, because lease payments would not be credited toward the purchase of the vessel, unless the agreement so specified as part of a lease with an option to purchase. In light of the fact that the agreement is strictly a "purchase agreement," and that there is no language of a "lease" in the agreement, I find the purchase required the net proceeds of the F/V MARGARET G to be applied toward the purchase of the vessel.

The purchase agreement is an installment sales contract.⁴² Under the agreement, Mr. Mittenen was required to make periodic payments (which include "all" of the vessel's "net proceeds") towards the purchase of the vessel, and Cruzan Fisheries, Inc., was required to transfer title to Mr. Mittenen upon completion of the last payment. Mr. Mittenen had the right to the exclusive use and enjoyment of the vessel while the purchase agreement was in effect.

⁴²See, BLACK'S LAW DICTIONARY, (6th ed. 1990), at 930, which defines an "installment sale" as a "sale in which the buyer makes periodic payments and generally the seller reserves title until full payment has been made."

As a matter of law, the purchase agreement cannot be a vessel lease.⁴³ In a lease, the owner retains ownership of the vessel and the right to the return of the vessel at the end of the stated term. The purchase agreement does not provide for the vessel to be returned to Cruzan Fisheries, Inc., at the end of the stated term, but rather, for title to be transferred to Mr. Mittenen upon completion of the last payment.

The weight of the evidence shows that the purchase agreement was in effect during the relevant time (September 11, 1989).

Both parties testified that two quarterly installments were paid for the purchase of the vessel in checks of \$20,000 and \$50,000. This is consistent with Mr. Mittenen's settlement report and bank statement (October 1989) which shows payments to Cruzan Fisheries, Inc. in amounts of \$20,000 and \$30,000 in August and \$50,000 in October of 1989. The payments are also consistent with the purchase agreement, which required a minimum quarterly installment payment of \$25,000, beginning July 1, 1989, and the payment of *all* net proceeds from the vessel's fishing operations.

The evidence also shows that Mr. Mittenen was in charge of the vessel and crew, and the vessel's fishing operations during the relevant period. The settlement report shows that Mr. Mittenen paid the crew, paid the operating expenses of the vessel, and landed the fish on his fishing permit during the relevant period. These actions are consistent with the purchase agreement, which required that he serve as the vessel's captain, manage the harvesting and marketing of the fish, and pay the net proceeds to Cruzan Fisheries, Inc.

The evidence further shows that Mr. Mittenen assumed the financial risk of the fishing operations of the F/V MARGARET G during the relevant period. The settlement report shows that during that period Mr. Mittenen borrowed and paid interest on a \$20,000 personal loan from Alaska Pacific Seafoods [APS]; and paid crew wages, bait/salt, fishing gear, groceries, and vessel repairs. Mr. Mittenen's bank checks show that he paid for advances on wages, grid use, a truck, repairs, parts, supplies, gear, dock charges, and fuel. The financial responsibilities assumed by Mr. Mittenen were consistent with his responsibilities under the purchase agreement, which required him to pay the expenses of the vessel.

The evidence finally shows that Mr. Mittenen treated the F/V MARGARET G as his own business during the relevant period. The settlement report shows that Mr. Mittenen had an account with APS, from which the income and expenses of the F/V MARGARET G were received and paid. Individual

⁴³See, BLACK'S LAW DICTIONARY, (6th ed. 1990), at 889 (Citations omitted), which defines a "lease" of tangible personal property as an "agreement under which owner gives up possession and use of his property for valuable consideration and for definite term and *at the end to term owner has absolute right to retake, control, and use property*. We have recognized this definition of a "lease" in Kristovich v. Dell, Appeal No. 0010, March 20, 1996, *aff'd* March 27, 1996.

checks were also written on Mr. Mittenen's bank account, from which expenses of the F/V MARGARET G were paid. The APS and bank accounts are consistent with the terms of the purchase agreement, which allowed for Mr. Mittenen to use the F/V MARGARET G for commercial fishing.

While much of the evidence is consistent with the existence of a vessel lease, and while several of our lease factors are satisfied, as a matter of law a lease could not have existed during the time the purchase agreement was in effect.⁴⁴ Under the purchase agreement, Mr. Mittenen acquired not only the exclusive use and possession of the vessel, but also rights to the ownership of the vessel (an equity interest). Thus, Mr. Mittenen did not have a lease interest in the vessel while the purchase agreement was in effect.

Mr. Mittenen's "beneficial or equitable ownership" of the F/V MARGARET G

In Weber v. Kochuten,⁴⁵ we ruled that the evidentiary limitations of vessel ownership under federal regulation 50 C.F.R. § 679.40(a)(3)(ii) do not apply on appeal, and that Appeals Officers are governed by the different evidentiary standard of 50 C.F.R. § 679.43(j), which allows them to consider "all evidence that is relevant, material, reliable, and probative."⁴⁶

RAM's records show Cruzan Fisheries, Inc., was the registered owner of the F/V MARGARET G during the relevant period.

As a matter of law,⁴⁷ Mr. Mittenen was also the owner of the vessel while the purchase agreement was in effect. Even though Mr. Mittenen did not hold title to the vessel, the purchase agreement afforded

⁴⁴*Id.* See also, the following the cases, which distinguish installment sales contracts from leases: Gershwin v. U.S., 153 F.Supp. 477, 478, 139 Ct. Cl. 722; Bush Leasing, Inc. v. Gallo, Fla.App. 1 Dist. 634 So.2d, 737, 740; Kraemer v. General Motors Acceptance Corp., Fla., 572 So.2d 1363, 1365; In re Rainey, D.C. Md. 31 F.ed 197, 198; and French v. Brewer, 9 Fed. Cas. 774, 776.

⁴⁵Appeal No. 95-0122, June 18, 1996.

⁴⁶*Id.*, at 6. The evidentiary limitation of 50 C.F.R. § 679.40(a)(3)(ii) was published November 9, 1993, and took effect January 1, 1994. 58 Fed. Reg. 59,375-59,376; 59,406 (1993). The evidentiary standard of 50 C.F.R. § 679.43(j) was published June 1, 1994, and took effect July 1, 1994. 59 Fed. Reg. 28,281; 28284 (1994).

⁴⁷See, BLACK'S LAW DICTIONARY (6th ed. 1990) at 107-108, which defines a "beneficial owner" as one who "does not have title to property but has rights in the property which are the normal incident of owning the property. The persons for whom a trustee holds title to property are the beneficial owners of the property, and the trustee has a fiduciary responsibility to them." See also, *Id.* at 373, which defines an "equitable owner" as one who "is recognized in equity as owner of the property, because real and beneficial use and title belong to him, even though bare legal title is invested in another."

him all of the rights and obligations of vessel ownership. Mr. Mittenen was an equitable or beneficial owner of the F/V MARGARET G, who had the right to the exclusive use and possession of the vessel; was liable for the acts of the crew as a vessel owner;⁴⁸ was at financial risk for the vessel's operating expenses; and could compel Cruzan Fisheries, Inc., to credit payment of the vessel's net proceeds towards the purchase of the vessel. Mr. Mittenen was, in every respect, the kind of person intended by the North Pacific Fisheries Management Council to receive QS.

Under the circumstances, I conclude that the purchase agreement is the best evidence of ownership at the time here in question, and that it is superior to RAM's record of ownership of the vessel. In light of the purchase agreement, I conclude as a matter of law that Mr. Mittenen was the owner of the vessel at the time of the halibut landing. Therefore, I conclude that he is a qualified person for an initial issuance of halibut QS, and he should receive IFQ credit for the September 11, 1989 halibut landing from the F/V MARGARET G and the resultant halibut QS.

Conclusion

I conclude the weight of the evidence shows that Mr. Mittenen did not have a lease/purchase arrangement for the F/V MARGARET G in 1989. At most, Mr. Mittenen had a purchase agreement that was converted into a lease after the relevant period. Fatal to Mr. Mittenen's lease claim was the existence of a signed purchase agreement for the F/V MARGARET G, which was not a lease/purchase agreement, and which the parties testified was in effect at the time the only qualifying halibut landing was made from the vessel (September 11, 1989).

The evidence of a lease that was presented by Mr. Mittenen was consistent with the requirements of the purchase agreement. As a matter of law, Mr. Mittenen could not have leased the vessel during the time the purchase agreement was in effect. Mr. Mittenen purchased an equity interest in the vessel that allowed him to possess and own the vessel for an indefinite period of time. Absent a default in the installment payments by Mr. Mittenen, the owner had no right to reclaim or retake the vessel at the end of the agreement.

Mr. Mittenen was a "beneficial and equitable owner," and not a "lessee," of the F/V MARGARET G at the time of the 1989 halibut landing. Consequently, Mr. Mittenen does not qualify for QS as a lessee of the vessel. He does, however, qualify for halibut QS as the owner of the vessel under the purchase agreement, which is the best evidence of ownership in this case.⁴⁹

⁴⁸See, American Car & Foundry Co. v. Brassert, 289 U.S. 261, 53 S.Ct. 618, 77 L.Ed. 1162 (U.S.Ill., (May 8, 1933) (NO. 623).

⁴⁹An ADF&G intent to operate was also not filed with the state of Alaska in 1989, at the time of the relevant *halibut* landing. However, an ADF&G was not required because there is no evidence that Mr. Mittenen was engaged in the processing (freezing) of the fish.

5. Can Mr. Mittenen receive halibut QS based on the halibut landings made from the F/V MASONIC in 1984, as a former shareholder of a dissolved corporation, Wesfisco, Inc.?

The IFQ regulations provide that a former shareholder of a dissolved corporation, who would otherwise qualify as a person, may apply for QS in proportion to his or her interest in the dissolved corporation.⁵⁰ Evidence of ownership interest in a dissolved corporation is limited to corporate documents (e.g. articles of incorporation) or notarized statements signed by each former shareholder or director, and specifying their proportions of interest.⁵¹

The evidence shows that Wesfisco, Inc., owned the F/V MASONIC at the time the vessel made halibut landings in June and July 1984, and that Wesfisco, Inc., was dissolved September 1985. Mr. Mittenen claims IFQ credit for these landings as the sole former shareholder (successor-in-interest) of Wesfisco, Inc.

Mr. Mittenen produced the following documents in support of his claim:

articles of incorporation for Wesfisco, Inc., filed June 1, 1981, with the state of Washington, showing Mr. Dan Severson and Mr. Mittenen as the directors of the corporation;

a subchapter S election tax form for Wesfisco, Inc., dated June 29, 1981, showing Mr. Mittenen's and Mr. Severson's co-ownership (425 shares each) of Wesfisco, Inc.;

an annual report of Wesfisco, Inc., dated July 23, 1981, showing Mr. Mittenen, Mrs. Bea Mittenen, and Mr. Dan Severson as officers, and Mr. Mittenen and Mr. Severson as directors, of Wesfisco, Inc.;

an unsigned "call option agreement," providing for Wesfisco, Inc., to purchase the shares of Mr. Dan Severson;

an unsigned notice of resignation of Dan Severson as vice-president and director of Wesfisco, Inc., dated March 1982;

a mortgage of the F/V MASONIC to Old National Bank of Washington, signed by Mr. Mittenen as the President of Wesfisco, Inc., and dated March 15, 1982;

⁵⁰See, 50 C.F.R. § 679.40(a)(2)(iii).

⁵¹See, 50 C.F.R. § 679.40(a)(3)(iv).

a promissory note, signed by Mr. Mittenen and Mrs. Bea Mittenen, as individuals, and dated March 15, 1982, for a loan of \$345,000 to Wesfisco, Inc., by Old National Bank of Washington for the purchase of the F/V MASONIC;

an annual report of Wesfisco, Inc., dated June 30, 1982, signed by Mrs. Bea Mittenen, showing Tom and Bea Mittenen as officers, and Mr. Mittenen as the director, of Wesfisco, Inc.;

a letter from Mr. Severson's lawyer, Jerome D. Carpenter, dated July 19, 1982, stating that Mr. Severson is not an officer, director, or shareholder of Wesfisco, Inc.;

a Certificate of Administrative Dissolution for Wesfisco, Inc., dated September 16, 1985, issued by the Secretary of State, state of Washington;

the affidavit of Mr. Mittenen, dated Feb. 27, 1998, stating that Mr. Severson was a director and officer and co-owner of Wesfisco, Inc., in 1981, and that Mr. Severson sold his shares in Wesfisco, Inc., in 1982;

the affidavit of Mrs. Mittenen, dated Feb. 25, 1998, stating that Mr. Severson sold his shares in Wesfisco, Inc. in 1982, and that Mr. Mittenen was the sole owner of Wesfisco, Inc. and operator of the F/V MASONIC, in 1984.

the affidavit of Mr. Mittenen, January 21, 1998, stating that " ... the F/V MASONIC was lost in the fall of 1984 during a subsequent charter. As a result of the casualty, Company no longer had any assets and it became defunct and was dissolved by the State of Washington."

Mr. Mittenen's attorney, Mr. John Gissberg, made two requests to the Secretary of State, state of Washington, for the corporate records of Wesfisco, Inc., on January 7, 1998, and Feb. 19, 1998. Initially, the state told Mr. Gissberg that it did not have records on Wesfisco, Inc., as far back as 1976. The state later produced a copy of its records of Wesfisco, Inc.'s corporate filings.⁵²

The records produced on appeal do not show definitively who owned Wesfisco, Inc., at the time of dissolution, September 1985. The latest evidence of ownership of Wesfisco, Inc., is from 1982. The evidence is strong enough, however, to infer that Mr. Mittenen was the sole owner of Wesfisco, Inc., at the time of dissolution.

⁵²See, the January 26, 1998, memo from Mr. Mittenen's attorney, John Gissberg, to the Secretary of State, state of Washington, confirming payment for the copies of the state's records on Wesfisco, Inc.

A subchapter S tax form for Wesfisco, Inc., shows that Mr. Mittenen and Mr. Severson co-owned the corporation on June 1981. The document is signed by Mr. Mittenen as president of Wesfisco, Inc. Unsigned corporate documents show that in 1982 Wesfisco, Inc., could have elected to buy Mr. Severson's shares, and that Mr. Severson contemplated resignation as the vice-president and director of Wesfisco, Inc. A July 19, 1982 letter from Mr. Severson's attorney states that Mr. Severson was no longer a shareholder, director, or officer of the corporation. The annual reports of Wesfisco, Inc., show Mr. Severson as a director of the corporation in 1981, and Mr. Mittenen as the sole director of the corporation in 1982. The mortgage and promissory note for the F/V MASONIC, dated March 15, 1982, is signed only by Mr. Mittenen and the former Mrs. Mittenen. Both Mr. Mittenen and the former Mrs. Mittenen affirm in their affidavits that Mr. Severson sold his shares in Wesfisco, Inc., in 1982, and that Mr. Mittenen was the sole owner of Wesfisco, Inc., and operator of the F/V MASONIC in 1984. The landings made from the vessel in 1984 were made on Mr. Mittenen's fishing permit.

Mr. Mittenen is the only person to claim QS through Wesfisco, Inc. The corporate records suggest that Mr. Severson ended his relationship with Wesfisco, Inc., in 1982. Mr. Severson's own attorney acknowledged in July 1982 that Mr. Severson was no longer a shareholder, director, or officer of Wesfisco, Inc. Mr. Severson's name is also strikingly absent on the March 1982 mortgage and promissory note for the F/V MASONIC, signed individually, and on behalf of Wesfisco, Inc., by Mr. Mittenen and the former Mrs. Mittenen. There is nothing in the record that is inconsistent in the affidavits of Mr. Mittenen and the former Mrs. Mittenen.

While the records do not conclusively show who owned the F/V MASONIC at time of dissolution, I find no reason to believe that Wesfisco, Inc., was owned by someone other than Mr. Mittenen.

In light of this, I find by a preponderance of the evidence that Mr. Mittenen was the sole owner of Wesfisco, Inc., at time of dissolution. As the only shareholder of a dissolved corporation that had owned the vessel at that time of the 1984 halibut landings, I conclude that Mr. Mittenen is eligible for all of the halibut QS associated with those landings.

FINDINGS OF FACT

1. Mr. Mittenen inadvertently failed to claim that he leased the F/V MARGARET G in 1989 on his RFA.
2. Mr. Mittenen did not inform RAM, by the 90-day response deadline, of his claim that he leased or owned the F/V SALTY III or the F/V PARAGON II. These claims were made for the first time on appeal and were not reasonably raised by any claims Mr. Mittenen made to RAM.
3. The affidavit of Mr. Mittenen and Mr. Dale Hofman of Cruzan Fisheries, Inc., attesting to a

lease/purchase arrangement of the F/V MARGARET G between 1988 and 1991, is notarized and signed by the vessel owner and claimed lease holder, and identifies the name of the lease holder, the name of the leased vessel, and the period of time during which the lease was in effect.

4. Several pieces of evidence in the record were inconsistent with the affidavit of Mr. Mittenen and Mr. Dale Hofman regarding the claimed lease of the F/V MARGARET G between 1998 and 1991.

5. The affidavit of Mr. Mittenen and Mr. Dale Hofman of Cruzan Fisheries, Inc., concerning the alleged lease of the F/V MARGARET G between 1988 and 1991 is not credible.

6. Landings of sablefish were made from the F/V MARGARET G on April 28, 1988, April 30, 1988, May 3 1988, and August 10, 1988.

7. An ADF&G intent to operate was not filed for the F/V MARGARET G before the harvest and processing of sablefish that was landed from the vessel on April 28, 1988, April 30, 1988, and May 3, 1988, and August 10, 1988.

8. Cruzan Fisheries, Inc., was convicted by the State of Alaska for failure to file an ADF&G intent to operate before the harvest and processing of sablefish that was landed from the F/V MARGARET G on April 28, 1988, April 30, 1988, May 3, 1988, and August 10, 1988.

9. The state fish tickets for the landings of April 28, 1988, April 30, 1988, and August 10, 1988, are not signed by the fish buyer, list the weight of the fish in whole numbers to the nearest 1,000 pounds, and were filed with the state of Alaska on October 27, 1988, several months after the landings.

10. The state fish ticket for the landing of May 3, 1988 is not signed by the holder of the fishing permit.

11. The purchase agreement in this appeal provided for the net proceeds of the F/V MARGARET G to be applied toward the purchase of the vessel.

12. The testimony and actions of Mr. Mittenen and Mr. Hofman show that the purchase agreement for the F/V MARGARET G was in effect at the time the only qualifying halibut landing was made from the vessel (September 11, 1989).

13. The U.S. Coast Guard abstract of title for the F/V MASONIC shows that the vessel was owned by Wesfisco, Inc., when the vessel made halibut landings in June and July 1984.

14. The State of Washington's records show that Wesfisco, Inc., was dissolved in September 1985.

15. There are no corporate documents in the record showing who owned Wesfisco, Inc., in 1985, at

the time of its dissolution.

16. The latest evidence of ownership of Wesfisco, Inc., is for 1982, which shows Mr. Mittenen as the sole owner of the corporation at that time.

17. The evidenced produced on appeal is consistent with Mr. Mittenen's sole ownership of Wesfisco, Inc., at time of its dissolution.

CONCLUSIONS OF LAW

1. Mr. Mittenen's claim that he held a lease of the F/V MARGARET G in 1989 was timely made and can be considered on appeal for purposes of QS.

2. Mr. Mittenen's claims that he leased the F/V SALTY III and the F/V PARAGON II were not timely made, and therefore cannot be considered on appeal for purposes of QS.

3. On its face, the affidavit of Mr. Mittenen and Mr. Hofman, on behalf of Cruzan Fisheries, Inc., regarding their claimed lease agreement for the F/V MARGARET G meets the regulatory requirements for conclusive evidence of a vessel lease.

4. An affidavit that on its face satisfies the regulatory requirements for conclusive evidence of a vessel lease is conclusive evidence of a vessel lease, unless there is evidence in the record that the affidavit is not truthful or credible.

5. The affidavit of Mr. Mittenen and Mr. Dale Hofman is not conclusive evidence of a lease of the F/V MARGARET G.

6. The ADF&G intent to operate regulation is a state commercial fishing regulation that must be complied with in order for the landing of sablefish that were harvested and processed aboard a catcher/processor vessel to be considered a "legal landing" for purposes of QS.

7. The landings from the F/V MARGARET G on April 28, 1988, April 30, 1988, May 3, 1988, and August 10, 1988, are not legal landings for purposes of QS because the fish tickets for the landings were incomplete and untimely filed and, thus, the landings were not made in compliance with state of Alaska commercial fishing regulations.

8. The landings from the F/V MARGARET G on April 28, 1988, April 30, 1988, and August 10, 1988, are not legal landings for purposes of QS because the fish tickets for the landings were untimely filed and, thus, the landings were not made in compliance with federal commercial fishing regulations.

9. The state fish tickets for the landings from the F/ V MARGARET G on April 28, 1988, April 30, 1988, and August 10, 1988, are insufficient evidence of legal landings under 50 C.F.R. § 679.40(a)(3)(v)(B) and cannot be used as a basis for allocating the qualifying pounds of sablefish to Mr. Mittenen.
10. Even if Mr. Mittenen had leased the F/V MARGARET G in 1988, he would not have qualified for sablefish QS because "legal landings" of sablefish were not made from the vessel during that year.
11. The purchase agreement in this appeal is an installment sales contract.
12. The purchase agreement in this appeal cannot be a vessel lease.
13. The purchase agreement in this appeal was in effect at the time the only qualifying halibut landing was made from the F/V MARGARET G (September 11, 1989).
14. As a matter of law, a vessel lease could not have existed during the time the purchase agreement for the F/V MARGARET G was in effect.
15. During the period in which the purchase agreement was in effect, Mr. Mittenen was an "equitable or beneficial owner," and not a "lessee," of the F/V MARGARET G.
16. During the period the purchase agreement was in effect, Mr. Mittenen had the right of exclusive use and possession of the vessel; was liable for the acts of the crew as a vessel owner; could compel Cruzan Fisheries, Inc., to credit the vessel's net proceeds towards his purchase of the vessel; and was at financial risk for the vessel's operating expenses.
17. Mr. Mittenen was, in every respect, the kind of person that the North Pacific Fishery Management Council intended to receive QS.
18. Under the circumstances, the purchase agreement in this appeal is the best evidence of vessel ownership of the F/V MARGARET G, and is therefore superior to RAM's record of vessel ownership.
19. Mr. Mittenen qualifies for halibut QS as a beneficial and equitable owner of the F/V MARGARET G.
20. The weight of the evidence shows that Mr. Mittenen was the sole owner of Wesfisco, Inc., at the time of the corporation's dissolution.
21. Mr. Mittenen is a qualified person eligible for the halibut QS associated with the landings made

from the F/V MASONIC in 1984.

DISPOSITION

The portion of the IAD, relating to the Mr. Mittenen's claim of a lease of the F/V MARGARET G in 1988 is AFFIRMED. The portion of the IAD relating to the lease of the F/V MARGARET G in 1989 and the ownership of the F/V MASONIC in 1984 is VACATED. RAM is ORDERED to allocate to Mr. Mittenen the qualifying pounds of halibut made from the F/V MARGARET G in 1989 and the F/V MASONIC in 1984, and to issue to him the resultant QS. This Decision takes effect on February 22, 1999, unless by that date the Regional Administrator orders review of the Decision.

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 February 1, 1999, 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