

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of )  
 )  
WALLACE BOTSFORD )  
F/V LADY JANE ) DECISION  
ADF&G # 23081 )  
Appellant )  
\_\_\_\_\_ )  
November 1, 1999

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) on Reconsideration on June 7, 1996, which denied Mr. Botsford's application for a Vessel Moratorium Qualification and Permit under the Vessel Moratorium Program on Groundfish and Crab.<sup>1</sup> The IAD concluded that Mr. Botsford was not entitled to a moratorium qualification or permit based on the landings of the F/V LADY JANE because he was not the current owner of that vessel and he had not shown that he retained the moratorium qualification of the vessel.

RAM referred this case to this Office for filing as an appeal. Because the record contains sufficient information on which to reach a final decision, because there is no genuine and substantial issue of adjudicative fact for resolution, and because Mr. Botsford did not request a hearing, no hearing was ordered.<sup>2</sup>

ISSUE

Is Mr. Botsford entitled to a vessel moratorium qualification based on the landings of the F/V LADY

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<sup>1</sup> The Vessel Moratorium Program for Groundfish and Crab is found at 50 C.F.R. § 679.4(c). The Moratorium Program expires on December 31, 1999. This decision involves Mr. Botsford's rights under the Moratorium Program. This decision does not affect Mr. Botsford's rights under the North Pacific License Limitation Program (LLP) which is found at 50 C.F.R. § 679.4(k). As of January 1, 2000, a license limitation permit will be necessary to harvest certain species of groundfish in the Gulf of Alaska and Bering Sea and Aleutian Islands areas and certain species of crab in the Bering Sea and Aleutian Islands area. The application period for LLP is from September 13, 1999 through December 17, 1999. For further information on the License Limitation Program, Mr. Botsford may contact Restricted Access Management (RAM), NMFS, Box 21668, Juneau, Alaska 99802-1668, 907-586-7474 or 1-800-304-4846 (option 2).

<sup>2</sup> See 50 C.F.R. § 679.43.

JANE?

## BACKGROUND

Mr. Botsford applied for a Vessel Moratorium Qualification on January 23, 1996. Mr. Botsford claimed landings from the F/V LADY JANE of moratorium groundfish with trawl, hook and pot gear. He simultaneously filed an Application for Transfer of Vessel Moratorium Qualification from the F/V LADY JANE to the F/V MADRE DOLOROSA. The application listed Mr. Botsford both as the person transferring the qualification and the person receiving the qualification.

RAM made an Initial Administrative Determination on April 5, 1996, which denied Mr. Botsford's application for a moratorium qualification. RAM did not issue a separate decision on Mr. Botsford's application to transfer the qualification. The IAD informed Mr. Botsford that the records available to RAM showed that Frank Mustappa, not Wallace Botsford, was the owner of the F/V LADY JANE. RAM issued Mr. Botsford a non-transferable Certificate of Moratorium Qualification for the F/V LADY JANE pending final agency action on his application.<sup>3</sup>

On April 18, 1996, Wallace Botsford asked RAM to reconsider its decision. Mr. Botsford stated: "I sold the Lady Jane to Frank Mustappa May 4, 1992." He said that he owned the F/V LADY JANE during the original qualifying period of January 1, 1988 through February 9, 1992. Mr. Botsford gave RAM a copy of a Preferred Vessel Mortgage, dated May 4, 1992. The mortgage showed Frank Mustappa as mortgagor and "100% . . . and sole owner of the vessel" and Wallace and Jane Botsford as the mortgagees.

On reconsideration, RAM affirmed its earlier IAD. RAM stated that both its records and Mr. Botsford's records show Frank Mustappa as the current owner of the F/V LADY JANE. RAM concluded:

The moratorium qualification of a vessel follows the vessel and therefore, barring any agreements to the contrary between buyer and seller, the moratorium qualification of a vessel can only be awarded to the owner of the vessel at the time of application for a moratorium qualification and/or permit.

## DISCUSSION

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<sup>3</sup> Because of the need for vessel owners to show that their vessel had moratorium qualification, RAM began issuing an actual Certificate of Moratorium Qualification, in addition to the vessel moratorium permits. Federal regulation 50 C.F.R. § 679.4(c)(10) specifically directs RAM to issue an applicant a moratorium permit, which is valid pending final agency action on their application. In keeping with this regulation, RAM also issues the applicant a non-transferable Certificate of Moratorium Qualification, which is valid pending final agency action on an application.

Under the Moratorium Program, a moratorium permit is to be issued to the owner of the vessel at the time of application. 50 C.F.R. § 679.4(c)(6).<sup>4</sup> A moratorium permit is based upon the vessel having moratorium qualification, which means that the vessel made landings of moratorium species during the qualifying period of January 1 1988 through February 9, 1992.<sup>5</sup> A vessel's moratorium qualification may be severed from the vessel, but the current vessel owner is presumed to be the owner of the vessel's qualification unless otherwise specified in an agreement or contract.<sup>6</sup>

The evidence submitted by Mr. Botsford shows that he sold the vessel to Frank Mustappa on May 4, 1992. The mortgage executed contemporaneously with the sale identifies Mr. Mustappa as 100% owner of the vessel and Wallace and Jane Botsford as having a security interest only in the vessel. The record contains no indication that the buyer and seller agreed to separate the vessel's qualification from the vessel and agreed that Mr. Botsford would retain the F/V LADY JANE's moratorium qualification. Put another way, the record contains no indication that, when Mr. Botsford applied for the F/V LADY JANE's moratorium qualification, he was the owner of that qualification.

Mr. Botsford is correct that the qualifying period for the Moratorium Program is January 1, 1988

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<sup>4</sup> Formerly 50 C.F.R. § 676.5(b). The former section in question specified that the moratorium permit is to be issued to "the owner of the vessel at the time of the permit application." The new section eliminated that language and states that the permit will be issued "to the owner of a vessel" who submits a complete application that is accepted and approved. 50 C.F.R. § 679.4(c)(6)(i). This still means the owner at the time of application. First, it would be unreasonable to read into the current regulation the phrase the owner of the vessel "during the qualifying period." Second, the new regulation was promulgated as part of a renumbering and consolidation of the NMFS regulations in 1996. The summary of these new regulations in the Federal Register states: "This final rule does not make substantive changes to the existing regulations . . . ." 61 Fed. Reg. 31,228 (1996).

<sup>5</sup> 50 C.F.R. § 670.4(c)(7).

<sup>6</sup> In re Application of Yukon Queen Fisheries, LLP, Appeal No. 96-0009, September 17, 1998. This decision relied on the preamble to the moratorium regulations which provides in part:

Moratorium qualification is presumed to belong to the current owner of the vessel that made a legal landing of moratorium species from January 1, 1988, through February 9, 1992, unless otherwise specified in a purchase agreement or contract. The moratorium qualification of a vessel may be transferred from the owner of the vessel to another person by mutual agreement. For example, the moratorium qualification of a vessel may be retained by the vessel's owner for liquidation independently of the vessel. A vessel owner also may choose to retain the moratorium qualification of the vessel when it is sold, lost, or destroyed, so that he/she can obtain a moratorium permit for a replacement vessel. Regardless of the reason for transferring a moratorium qualification, valid documentation of the transfer is required before the transfer will be approved and a moratorium permit issued based on that moratorium qualification.

60 Fed. Reg. 40,766 (1995).

through February 9, 1992. RAM's Official Record for the Moratorium Program shows that the F/V LADY JANE is a qualified vessel and made landings of moratorium groundfish during that period. Mr. Mustappa did not apply for the qualification or permit for the F/V LADY JANE. That could be due to many reasons. The mere absence of an application from Mr. Mustappa, by itself, is not sufficient to show there is a genuine factual question whether Mr. Mustappa and Mr. Botsford agreed that Mr. Botsford retained the moratorium qualification rights of the F/V LADY JANE.

Therefore I conclude, based on this record, that Mr. Botsford is not entitled to a moratorium qualification based upon the landings of the F/V LADY JANE.

#### FINDINGS OF FACT

1. Mr. Botsford was not the owner of the F/V LADY JANE when he applied for the moratorium qualification of that vessel.
2. Mr. Botsford did not retain the right to the moratorium qualification of the F/V LADY JANE when he sold the vessel.

#### CONCLUSION OF LAW

Mr. Botsford is not entitled to a moratorium qualification based on the landings of the F/V LADY JANE.

#### DISPOSITION

The IAD on Reconsideration that is the subject of this appeal is AFFIRMED. This Decision takes effect December 1, 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 by this Office not later than 4:30 p.m. Alaska time, on the tenth day after this Decision, November 12, 1999. 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.

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Mary Alice McKeen  
Appeals Officer