

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 96-0067
)
MARK C. LEVENSON,) DECISION
Appellant)
_____) November 5, 1999

STATEMENT OF THE CASE

The Appellant Mark Levenson filed a timely appeal of an Initial Administrative Determination [IAD] issued May 15, 1996, by the Restricted Access Management [RAM] program.¹ The IAD denied Mr. Levenson's request for additional pounds of halibut Individual Fishing Quota [IFQ] "underage carryover" for the 1996 fishing season. Mr. Levenson has adequately shown that his interests are directly and adversely affected by the IAD. A hearing was not ordered because the record contains sufficient information on which to reach a final decision, and because there is no genuine and substantial issue of adjudicative fact for resolution. 50 C.F.R § 679.43(g)(2)(3).²

ISSUE

Did RAM properly debit Mr. Levenson's 1995 IFQ accounts and adjust his accounts for 1996?

BACKGROUND

During the 1995 fishing season, Mr. Levenson harvested halibut from IFQ regulatory area 3A and from IFQ regulatory area 3B. The fish were weighed head-on at dockside by NMFS under a conversion formula to determine the gutted, head-off weight of the fish. The converted weight of the fish was recorded on NMFS landing reports, and debited from Mr. Levenson's IFQ account, for each IFQ regulatory area. The halibut were subsequently processed and weighed head-off by Tyson Enterprises Seafoods, Inc. The weight of the fish was recorded on state fish tickets. The converted weight recorded on the NMFS landing reports was greater than the actual head-off weight recorded on the state fish tickets.

Based on the converted weight recorded on the NMFS landing reports, RAM determined that Mr.

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

²Formerly, 50 C.F.R. § 676.25(g). All IFQ regulations were renumbered, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270(1996). The wording of the regulations in question was unchanged by the renumbering.

Levenson harvested 358 pounds less than his annual limit for IFQ regulatory area 3A, but that he exceeded his annual limit for IFQ regulatory 3B by 212 pounds. At the end of the 1995 fishing season, RAM increased Mr. Levenson's area 3A account for 1996 by the 358-pound "underage" and reduced his area 3B account by the 212-pound "overage." The result was a net increase of 146 pounds to Mr. Levenson's total fishing limit for the 1996 season.

In the IAD, RAM determined that it had correctly used the NMFS landing reports to debit Mr. Levenson's IFQ account. On appeal, Mr. Levenson argues that RAM should have used the lower weights recorded on state fish tickets to debit his IFQ account. He also argues that the total fish ticket weight landed in areas 3A and 3B combined amounted to 864 pounds less than his authorized limit for both areas combined. Therefore, he concludes, he should have received an "underage" credit of 864 pounds for 1996.

DISCUSSION

The debiting of Mr. Levenson's 1995 IFQ accounts

The applicable IFQ regulation in effect at the time of the landings in question [50 C.F.R. § 676.22(c)(3)(ii)[1995]³] provided:

The amount of halibut to be reported to NMFS for debit from an IFQ account will be the gutted, head-off weight determined by multiplying the initial accurate scale weight of the halibut obtained at the time of landing by the following conversion factors:

<u>Product code</u>	<u>Product description</u>	<u>Conversion factor</u>
01	Whole fish	0.75
04	Gutted, head on	0.90
05	Gutted, head off	1.00

In Kenneth M. Simpson,⁴ we stated that the critical determinant of the amount to be debited from a person's IFQ account is the weight obtained *initially* at the time of landing, regardless of whether that weight is reported on an IFQ landing report or a state fish ticket.⁵ We held that if the initial scale

³The conversion factors for Pacific halibut are now found at 50 C.F.R. § 679.42(c)(2)(iii) and in Table 3 to Part 679.

⁴Appeal No. 96-0066, April 22, 1999, at 3.

⁵IFQ regulations now make clear that IFQ landing reports will be the only source of information NMFS uses to debit IFQ accounts. *See*, 50 C.F.R. § 679.42(c)(2). The same regulation also specifies

weighing is done head-on, that is the weight that must be used (after applying the conversion factor) for debiting the IFQ account.

In Mr. Levenson's case, the initial weighing of his fish was done at dockside, head-on. The weights were recorded on NMFS landing reports, using the 0.90 conversion factor prescribed in the regulations to arrive at an official gutted, head-off weight of the fish. There is no evidence in the record, and Mr. Levenson does not allege, that the weights on the landing reports reflected any errors in the head-on scale weight, in the application of the conversion factor, or in the recording of the resulting amounts. Therefore, I find that the amounts recorded on the landing reports were correct and I conclude that RAM correctly debited Mr. Levenson's 1995 IFQ accounts.

The adjustment of Mr. Levenson's 1996 IFQ accounts

The next question is whether RAM correctly adjusted Mr. Levenson's 1996 IFQ accounts. The regulations providing for the adjustment of IFQ accounts that were in effect in 1995 were found at former 50 C.F.R. § 676.17(b) and (c).⁶ The first of these provisions specified that a person's annual IFQ account would be reduced in "the year following a determination that the person harvested or landed IFQ species in an amount greater than the amount available in the person's annual IFQ account," if the amount by which the person overfished was not more "than 10 percent of the amount available in the person's annual IFQ account at the time of landing." IFQ permit holders who exceed this 10 percent margin of error are subject to enforcement actions. In that event, all the fish harvested or landed in excess of the annual amount authorized by the IFQ permit, including the 10 percent margin, is subject to confiscation by enforcement agents. For administrative purposes, RAM treats the situation as if there had been no overfishing and makes no adjustment to the person's account for the next year. [Exhibit 1, Jessica Gharrett e-mail memo, 3 Nov 99]

The second of these two regulations, 50 C.F.R. § 676.17(c), provided that "[u]nderages of up to 10 percent of a person's total annual IFQ account for a current fishing year will be added to that person's annual IFQ account in the year following determination of the underage." It further provided that the adjustment would be specific to the species, regulatory area, and vessel category for which the IFQ is calculated.

that the weight recorded on the landing report shall be the "scale weight of the halibut or sablefish product actually measured at the time of landing." Another regulation, 50 C.F.R. § 679.5(1)(2)(vi), which is referenced in 50 C.F.R. § 679.42(c)(2), requires that landing reports include "the initial accurate scale weight made at the time offloading commences."

⁶The regulations are now found at 50 C.F.R. § 679.40(d) and (e).

RAM's Official Record showed that for 1995, Mr. Levenson's IFQ permit for regulatory area 3B authorized him to harvest 9,310 pounds of halibut. The record also shows that he actually harvested 9,522 pounds in area 3B that year, and that all of these pounds were landed on September 12, 1995. Since at the time of this landing all 9,310 pounds were still available in Mr. Levenson's 3B account, the 10 percent margin of error was measured against his total annual amount in his account. The 212-pound overage represented only 2 percent of the amount available in the account at the time of the landing. Therefore, I conclude that RAM correctly adjusted Mr. Levenson's 1996 IFQ account for area 3B when it deducted 212 pounds.

According to the IAD, the Official Record for 1995 showed that Mr. Levenson's IFQ account for regulatory area 3A authorized the harvest of 47,132 pounds. Mr. Levenson made two landings that year in area 3A, which totaled 46,774. This resulted in an underage of 358 pounds, which represented 1 percent of Mr. Levenson's total annual IFQ account for area 3A. Since this was clearly within the 10 percent underage carryover limit, I conclude that RAM correctly adjusted Mr. Levenson's 1996 IFQ account for area 3A when it added 358 pounds.

FINDINGS OF FACT

1. The amounts recorded on the Mr. Levenson's 1995 halibut landing reports were correct.
2. Mr. Levenson's 212-pound overage of the amount authorized by his 1995 IFQ permit for area 3B represented only 2 percent of the amount available in the account at the time of the landing.
3. Mr. Levenson's 358-pound underage of the amount authorized by his 1995 IFQ permit for area 3A represented 1 percent of his total annual IFQ account for area 3A.

CONCLUSIONS OF LAW

1. RAM correctly debited Mr. Levenson's 1995 IFQ accounts.
2. RAM correctly adjusted Mr. Levenson's 1996 IFQ accounts.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on December 6, 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 November 15, 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

Edward H. Hein
Chief Appeals Officer