

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 96-0079
)	
MORGAN DOUBLEDAY,)	DECISION
Appellant)	
_____)	November 2, 1998

STATEMENT OF THE CASE

Morgan Doubleday filed a timely appeal of an Initial Administrative Determination [IAD] issued on June 3, 1996, by the Restricted Access Management Program¹ [RAM]. Mr. Doubleday had asked RAM to allow him to fish in 1996 the 1995 IFQ that he had not fished. The IAD denied that request on the grounds that IFQ is calculated annually, and it is valid only in the year for which it is issued. Mr. Doubleday also requested that his 1996 IFQ amounts be increased by 10 percent of the IFQ amounts he did not fish in 1995. The IAD granted the latter request.

On appeal, Mr. Doubleday asks that the portion of the IAD that denied his request be reversed. He has adequately shown that the IAD has a direct and adverse effect on his interests. 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, no hearing was ordered.²

ISSUE

Can Mr. Doubleday have *all* of his unused 1995 IFQ added to his IFQ in 1996 or another year?

BACKGROUND

Mr. Doubleday demonstrated to RAM that he qualified for QS for halibut and sablefish in several IFQ regulatory areas. In late 1994, however, the Internal Revenue Service placed a levy on Mr. Doubleday's QS, which prevented RAM from sending the QS certificates and the associated 1995

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

²50 C.F.R. § 679.43(g)(2)-(3); formerly, 50 C.F.R. § 676.25(g)(2)-(3). 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.

IFQ permits to him.³ Meanwhile, Mr. Doubleday filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. This action stayed the IRS levy. On November 3, 1995, less than two weeks before the end of the fishing season, the U.S. Bankruptcy Court in Seattle issued an order that allowed Mr. Doubleday to fish his IFQs in two halibut areas [2C and 3A]. In response, RAM mistakenly issued 1995 IFQ permits to Mr. Doubleday for both halibut and sablefish, and included in the permits his IFQ for all the regulatory areas for which he was qualified. Mr. Doubleday made one fishing trip just before the end of the 1995 season. During that trip, he harvested 85 percent of his halibut IFQ in area 2C, and 56 percent of his sablefish IFQ in area SE. Mr. Doubleday did not harvest any of his 1995 IFQ in the other regulatory areas.

In January, 1996, Mr. Doubleday asked RAM to allowed him to fish the unused 1995 IFQ in 1996, or to increase his 1996 IFQ by the amounts not used in 1995. The Bankruptcy Court ordered RAM to release Mr. Doubleday's 1996 IFQs, and RAM did so in April and June of 1996. Under the provisions of 50 C.F.R. § 679.40(e), RAM supplemented Mr. Doubleday's 1996 IFQs with an additional 10 percent of his 1995 IFQ amounts for each regulatory area.

On appeal, Mr. Doubleday asks that his 1996 IFQ accounts be adjusted so that he can fish the remainder of his unused 1995 IFQ. Alternatively, he asks that he be allowed to use his 1995 IFQ permits and harvest the unfished amounts, in addition to fishing his 1996 IFQ permits, during the 1996 season.

DISCUSSION

IFQ regulation 50 C.F.R. § 679.40(e) provides:

(e) Underages. Underages 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. This underage adjustment to the annual IFQ will be specific to IFQ species, IFQ regulatory area, and vessel category for which an IFQ is calculated, and will apply to any person to whom the affected IFQ is allocated in the year following determination of underage.

Based on the IFQ figures listed in the IAD, it appears that RAM properly calculated the 10 percent of Mr. Doubleday's 1995 IFQ for each regulatory area and credited those amounts to his 1996 IFQ accounts. Mr. Doubleday does not challenge RAM's calculations. Rather, he asks that the remainder

³The U.S. Department of Justice determined that RAM was obligated to honor the IRS lien on January 26, 1996. See, Memo from Mr. Richard L. Shiffrin, Deputy Assistant Attorney, U.S. Department of Justice, Office of Legal Counsel, January 26, 1996, to Ms. Ginger Lew, General Counsel, U.S. Department of Commerce.

of the unused 1995 IFQ also be credited to him because his previous legal counsel, who represented him until August 1995, had failed to negotiate with the IRS to have the levy removed, thus preventing him from fishing until the final few days of the 1995 season. Mr. Doubleday further asserts that his previous attorney absconded with his money, which was supposed to be turned over to the IRS, and fled the United States.

Regardless of the reasons that kept Mr. Doubleday from using most of his 1995 IFQ, the IFQ regulations do not authorize the carrying over of more than 10 percent underage from one year to the next. Having reviewed all the evidence in the record and the relevant regulations, I conclude that Mr. Doubleday has already received all the 1995 underage carryover to which he is entitled, and that RAM has no authority to grant any more.

Nor does RAM have any authority to allow Mr. Doubleday to use his 1995 IFQ permits in any year other than 1995. It is apparent from a reading of 50 C.F.R. § 679.40(b) and (c), that IFQs are intended to be fished in the year for which they are issued. These regulations provide a formula for annually calculating IFQ amounts for the current year, based in part on the Total Allowable Catch for that year and the amounts in each QS pool as of January 31 of that year. Except as expressly provided otherwise, this formula is the exclusive method for calculating the amount of IFQ that a permit holder may fish in a given year.

There is nothing in the language of these provisions that authorizes or contemplates that an IFQ permit can be used in a subsequent year. To the contrary, the underage provision of 50 C.F.R. § 679.40(e) specifies the exclusive method of determining how much IFQ left unfished in a given year may be carried over to the next year.⁴ Furthermore, NMFS intended that, except for the 10 percent carryover provision, any unused IFQ would not be usable in a subsequent year. In the preamble to the proposed rule, NMFS stated that:

Underages of up to 10 percent of a person's annual IFQ account for the current fishing year would be added to that person's annual IFQ account for the following fishing year. Any amount of the underage exceeding 10 percent would expire at the end of the current fishing year.⁵

⁴The underage regulation actually provides that the 10 percent carryover is to be added to the person's IFQ account in the year following determination of the underage, rather than the year following the year in which the underage occurred. It appears from the record that Mr. Doubleday's 1995 underage was determined in 1996 and so, technically, it may be that the carryover amount should have been added to his 1997 IFQ account. Neither Mr. Doubleday nor RAM has raised this issue, however, so I do not decide here whether that aspect of the underage provision was properly applied in this instance.

⁵60 Fed. Reg. 22,308 (May 5, 1995).

Allowing Mr. Doubleday to use his 1995 IFQ permits in 1996, or any other year, would be inconsistent with the underage provision and, therefore, cannot be authorized.

FINDING OF FACT

RAM properly calculated the 10 percent of Mr. Doubleday's 1995 IFQ for each regulatory area and credited those amounts to his 1996 IFQ accounts.

CONCLUSION OF LAW

1. Regardless of the reasons that kept Mr. Doubleday from using most of his 1995 IFQ, the IFQ regulations do not authorize the carrying over of more than 10 percent underage from one year to the next.
2. Mr. Doubleday has already received all the 1995 underage carryover to which he is entitled, and RAM has no authority to grant any more.
3. RAM does not have authority to allow Mr. Doubleday to use his 1995 IFQ permits in any year other than 1995.
4. Except as expressly provided otherwise, the formula provided in 50 C.F.R. § 679.40(b) and (c) is the exclusive method for calculating the amount of IFQ that a permit holder may fish in a given year.

DISPOSITION

The IAD denying Mr. Doubleday's request for additional IFQ in 1996 is **AFFIRMED**. This Decision takes effect December 2, 1998, 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 12, 1998, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must allege one or more specific 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 this motion.

Edward H. Hein

Chief Appeals Officer