

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of )  
 )  
ANDREW R. and NICHOLAS J. )  
DOWIE, ) DECISION  
Appellants )  
 )  
 )  
\_\_\_\_\_ ) November 14, 2000

STATEMENT OF THE CASE

On September 15, 1998, Appellants Andrew and Nicholas Dowie filed separate Request for Applications (RFAs) for the initial issuance of Pacific halibut QS and sablefish QS under the Pacific halibut and sablefish Individual Fishing Quota (IFQ) program, as successors to their father's interest in QS, based on the lease of the F/V MARGARET G in 1988. The Appellants were children (ages 8 and 10) when their father, David Dowie, died in 1989.

On September 29, 1998, the Restricted Access Management program<sup>1</sup> (RAM) denied the RFAs<sup>2</sup> because they were filed more than four years after the established filing deadline of July 15, 1994 for QS under the IFQ program.<sup>3</sup>

The Appellants timely appealed the denial of the RFAs, based on "equitable tolling."<sup>4</sup> They claimed that the untimely filing of the RFAs should be excused because they were minors at the time of their father's death and the IFQ application period, and were unaware of the IFQ program. Because we concluded in two prior decisions that the F/V MARGARET G had not made legal landings of Pacific halibut and sablefish in 1988, we ordered the Appellants to prove otherwise.<sup>5</sup> The Appellants timely

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

<sup>2</sup>See the Initial Administrative Determinations for the RFAs.

<sup>3</sup>RAM published the IFQ application deadline in the Federal Register. See 59 Fed. Reg. 701, 702 (1994).

<sup>4</sup>The doctrine of equitable tolling permits an administrative agency to toll the running of a federal application period if extraordinary circumstances beyond the applicant's control prevented the applicant from filing in a timely manner. See, e.g., John T. Coyne, Appeal No. 94-0012, May 24, 1996.

<sup>5</sup>See the order, dated October 7, 1999.

responded to the order.<sup>6</sup>

The Appellants have adequately shown that their interests are directly and adversely affected by the IADs. We did not order an oral hearing because the record contains sufficient information on which to reach a final judgment, and because there is no genuine and substantial issue of adjudicative fact for resolution. 50 C.F.R. § 679.43(g)(2)-(3).

## ISSUE

Are the Appellants entitled to QS based on their father's lease of the F/V MARGARET G in 1988?

## PRINCIPLES OF LAW

1. To qualify for an initial issuance of QS under the regulations of the IFQ program, a "qualified person" or a "successor-in-interest" to a qualified person, must have owned or leased a vessel that made at least one legal landing of Pacific halibut or sablefish in a QS qualifying year: 1988, 1989, or 1990. [50 C.F.R. § 679.40(a)(2)-(3)]
2. To be considered a "legal landing" under the IFQ program, the Pacific 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. [50 C.F.R. § 679.40(a)(3)]
3. Evidence of a "legal landing" is limited to documentation of state fish tickets or federal catch reports that indicate the amount of Pacific 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. [50 C.F.R. § 679.40(a)(3)(v)(B)]
4. Under State of Alaska regulations in 1988, persons or companies that caught and processed fish or that caught and had the fish processed by another person or company, were required before operating to file an intent to operate with the Alaska Department of Fish and Game (ADF&G),<sup>7</sup> and to keep a

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<sup>6</sup>See the Appellants' reply, dated December 8, 1999.

<sup>7</sup>See 05 AAC 039.130(a), which reads in relevant part:

"(a) A person, company, firm, or other organization who is the first purchaser of raw fish, or who catches and processes fish or by products of fish, or who catches and has fish or by products of fish processed by another person or company, shall:

(1) furnish to the department [of ADF&G] each calendar before operating, a written statement of intent to operate with a description of the nature, extent, and location of the operation on forms available from the department: ..."

record of the landing of the fish on ADF&G fish tickets.<sup>8</sup> 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 area and fishery.<sup>9</sup>

## DISCUSSION

We concluded in two previous decisions that the F/V MARGARET G did not make legal landings of Pacific halibut or sablefish in 1988.<sup>10</sup> We did so because the state fish tickets for the sablefish landings were either incomplete or untimely filed, and because the F/V MARGARET G did not file an ADF&G intent to operate at the time of the vessel's harvest of Pacific halibut and sablefish. In one of those decisions,<sup>11</sup> we specifically ruled that "acceptance" of a state fish ticket *by another governmental agency* is not evidence of a legal landing, and that this agency must make the final decision as to whether a state fish ticket satisfies the requirements of a legal landing under the regulations of the IFQ program.

The Appellants claim (in their response to our order) that the F/V MARGARET G made legal landings of Pacific halibut and sablefish in 1988 because the ADF&G and the International Pacific Halibut Commission (IPHC) "accepted" the fish tickets for the landings;<sup>12</sup> and that the absence of an ADF&G intent to operate should not be considered as evidence of an illegal landing in this case because Mr. Dowie did not have an opportunity to challenge the vessel owner's (Cruzan Fisheries, Inc.) admission that it did not file an ADF&G intent to operate for the vessel.

In spite of these claims, the Appellants did not produce evidence in the record to show that the F/V

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<sup>8</sup>See 05 AAC 039.130(b), which reads in relevant part:

"(b) Each buyer of raw fish, and each fisherman selling to buyers not licensed to process raw fish, and each person or company who catches and processes his own catch or who has that catch processed by another person or company shall keep a record of each landing on ADF&G fish tickets. ..."

<sup>9</sup>See 05 AAC 039.130(b): which reads in relevant part:

"(b) ... Fish tickets must be submitted to a local representative of the department at least once a week, or as otherwise specified by the department for each particular area and fishery.

<sup>10</sup>See Thomas W. Mittenen, Appeal No. 96-0002, January 22, 1999; and Thomas W. Mittenen, Appeal No. 96-0002, Decision on Reconsideration, September 16, 1999.

<sup>11</sup>See Thomas W. Mittenen, Appeal No. 96-0002, Decision on Reconsideration, September 16, 1999, at 4.

<sup>12</sup>RAM's Official Record shows that the F/V MARGARET G landed sablefish on April 28, 1988, April 30, 1988, May 3, 1988, and August 10, 1988, and that the vessel landed Pacific halibut on May 25, 1988.

MARGARET G made legal landings of Pacific halibut and sablefish in 1988. Thus, the facts in this appeal (that relate to the landings made from the F/V MARGARET G in 1988) are the same as those in the two prior IFQ decisions.

The evidence in the record shows that the state fish tickets for the sablefish landings from the F/V MARGARET G in 1988 are incomplete or were untimely filed. As a result, the state fish tickets cannot be used as evidence of “legal landings” for purposes of initial issuance of QS under the IFQ program. Nor can ADF&G’s or IPHC’s “acceptance” of those state fish tickets be used as evidence of legal landings.

The evidence in the record also shows that the F/V MARGARET G did not have an ADF&G intent to operate in 1988. Appellants were given the opportunity *in this case* to prove that the F/V MARGARET had one, but they failed to provide evidence of such. Therefore, the vessel was not in compliance with State of Alaska regulations at the time of the vessel’s 1988 harvest of Pacific halibut and sablefish. Consequently, none of the vessel’s sablefish landings in 1988, including the vessel’s only Pacific halibut landing on May 25, 1988, may be considered “legal landings” for purposes of initial issuance of QS under the IFQ program.

In sum, the F/V MARGARET G did not make legal landings of Pacific halibut or sablefish in 1988 because fish tickets for the sablefish landings did not satisfy State of Alaska regulatory requirements, and because the F/V MARGARET did not have a valid ADF&G intent to operate at the time of the vessel’s harvest of Pacific halibut and sablefish. Consequently, the Appellants are not entitled to an initial issuance of QS in this case. Therefore, it is not necessary to determine whether the Appellants filed timely RFAs or whether David Dowie actually leased the vessel.

#### FINDINGS OF FACT

1. The state fish tickets for the sablefish landings from the F/V MARGARET G in 1988 are incomplete or were untimely filed.
2. The F/V MARGARET G did not have a valid ADF&G intent to operate in 1988.

#### CONCLUSIONS OF LAW

1. The state fish tickets for the sablefish landings from the F/V MARGARET G in 1988 are not evidence of legal landings for purposes of initial issuance of QS.
2. The F/V MARGARET G was not in compliance with the State of Alaska regulations in 1988, which required that the vessel have a valid ADF&G intent to operate.

3. The F/V MARGARET G did not make legal landings of Pacific halibut or sablefish in 1988.
4. The Appellants are not entitled to an initial issuance of QS, based on the lease of the F/V MARGARET by Mr. David Dowie in 1988.

#### DISPOSITION

The denials that are the subject of this appeal are AFFIRMED. This Decision takes effect on December 14, 2000, 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 24, 2000, 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.

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Randall J. Moen  
Appeals Officer