

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of )  
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RICHARD A. NEWBY, )  
Appellant )  
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Appeal No. 03-0025  
  
DECISION  
  
April 26, 2004

STATEMENT OF THE CASE

The Restricted Access Management (RAM) program issued an Initial Administrative Determination (IAD) that denied Mr. Newby's claim for sablefish Quota Share (QS) under the Pacific Halibut and Sablefish Individual Fishing Quota (IFQ) program, based on sablefish landings made by him during 1987.

Mr. Newby can appeal the IAD because he has filed a timely appeal and because his interests are directly and adversely affected by the IAD. [50 C.F.R. § 679.43(b)] An oral hearing is not necessary because the record contains sufficient information on which to reach a final decision. [50 C.F.R. § 679.42(m)(4)]

ISSUES

1. Can Mr. Newby's claim for sablefish QS be considered on appeal?
2. Does Mr. Newby qualify for sablefish QS, based on legal sablefish landings made by him in 1987?

SUMMARY

Mr. Newby made a timely claim for halibut QS and sablefish QS when he applied for QS under the IFQ program. Mr. Newby is a qualified person for *halibut* QS. RAM did not issue sablefish QS to Mr. Newby or tell him in an IAD that he did not qualify for sablefish QS. Mr. Newby did not inquire about his claim for sablefish QS until more than nine years later. Mr. Newby did not abandon his original claim for sablefish QS, and the IFQ regulations do not require him to renew his claim in order to have his claim considered on appeal.

Mr. Newby filed a timely appeal of a written IAD that denied Mr. Newby's claim for sablefish QS. The issuance of the IAD was the first time that an IAD had been issued with regard to Mr. Newby's claim for sablefish QS. Mr. Newby appealed the IAD within 60 days. Mr. Newby's claim for sablefish QS can be considered on appeal.

A recent Federal court decision allows Mr. Newby to qualify for sablefish QS as a qualified person for halibut QS who made legal sablefish landings during 1987. The issuance of sablefish QS to Mr. Newby would not be unfair to current QS holders, and would not frustrate the ability

of RAM to implement the IFQ program. Therefore, Mr. Newby is entitled to sablefish QS based on the sablefish landings made by him in 1987.

## ANALYSIS

### **1. Can Mr. Newby's claim for sablefish QS be considered on appeal?**

In a number of Decisions,<sup>1</sup> this Office has ruled that an applicant's claim for QS is entitled to be considered on appeal, as long as the claim was timely made during the IFQ application period and was timely appealed.

#### Mr. Newby's timely claim

Mr. Newby made a timely claim for sablefish QS when he submitted a Request for Application (RFA) for both sablefish QS and halibut QS during the IFQ application period.<sup>2</sup> Mr. Newby qualified for halibut QS, but RAM did not tell him that he did not qualify for sablefish QS or issue him sablefish QS.<sup>3</sup> Mr. Newby did not inquire about his claim for sablefish QS until more than nine years later.

RAM claims that Mr. Newby "abandoned" his claim for sablefish QS, and that the claim cannot be considered on appeal because he did not "renew" or "protest RAM's decision to deny his claim by not issuing him QS, until long after the time period for doing so had expired."<sup>4</sup>

The IFQ regulations do not specifically provide for the abandonment of a timely claim for QS. Nevertheless, we have said that a timely claim can be "abandoned" based on an affirmative representation by an applicant for QS.<sup>5</sup> In our case, there is no evidence that Mr. Newby told RAM that he had abandoned his claim for sablefish QS. Therefore, his claim for sablefish QS cannot be denied on the basis that he abandoned his claim.

The IFQ regulations also do not require an applicant to renew a timely claim for QS in order for

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<sup>1</sup>See, e.g., Tiger, Inc., Appeal No. 95-0100, November 17, 1995.

<sup>2</sup>Mr. Newby submitted the RFA on May 2, 1994. The RFA deadline was July 15, 1994. See 59 Fed. Reg. 701 (January 6, 1994).

<sup>3</sup>RAM states that had it send him an application for sablefish QS, the application would simply have stated: "Not Eligible for Sablefish QS." IAD at 2.

<sup>4</sup>IAD at 4.

<sup>5</sup>Matt Shadle, Appeal No. 95-0144, January 26, 1999, at 2.

the claim to be considered on appeal.<sup>6</sup> Therefore, Mr. Newby's claim for sablefish QS cannot be denied solely on the basis that he did not to renew or protest the denial of his claim until more than nine years after he made his original claim for sablefish QS.

### Mr. Newby's timely appeal

The IFQ regulations provide that "[a]ny person whose interest is directly and adversely affected by an IAD may file a written appeal."<sup>7</sup> To be considered a timely appeal, the appeal must be filed within 60 days of the IAD.<sup>8</sup> An "IAD" is a finding by NMFS staff on eligibility for, and the transfer and use of, QS and IFQ under the IFQ program.<sup>9</sup> "Initial Administrative Determinations [IADs] are made after evaluating all evidence provided by applicants, comparing that evidence with the data on the official record, and making a determination based on that comparison."<sup>10</sup>

In Tiger, Inc.,<sup>11</sup> we ruled that the issuance of QS was equivalent to a written IAD, for purposes of filing a timely appeal. In that case, it was evident that RAM had made an initial determination with regard to the applicant's claim for QS with the issuance of QS.<sup>12</sup>

RAM claims that it issued an IAD with regard to Mr. Newby's claim "simply by not issuing him sablefish QS."<sup>13</sup> I disagree. The non-issuance of QS is not the equivalent of the issuance of QS or of a formal IAD, and it should not be considered so in this case, for purposes of filing a timely appeal. At a minimum, an IAD provides notice to an applicant for QS that a determination has been made with regard to the applicant's claim and a date from which the applicant can timely appeal the claim. Due to the absence of an IAD in this case, Mr. Newby could only guess that his claim for sablefish QS had been denied, the reason for the denial of his claim, and the time

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<sup>6</sup>Tiger, Inc., Appeal No. 95-0100, November 17, 1995.

<sup>7</sup>50 C.F.R. § 679.43(b).

<sup>8</sup>50 C.F.R. § 679.43(d)(1).

<sup>9</sup>59 Fed. Reg. 28,281 (June 1, 1994).

<sup>10</sup>*Id.*

<sup>11</sup>Appeal No. 95-0100, November 17, 1995.

<sup>12</sup>The applicant, Tiger, Inc., had claimed on its RFA for QS that it owned the F/V SILVER ICE as of March 16, 1988, but RAM's QS Data Summary for Tiger, Inc., showed that Tiger, Inc., qualified for QS based only on its ownership of the vessel as of April 2, 1990.

<sup>13</sup>IAD at 2 and 4.

period for the timely appeal of his claim.<sup>14</sup>

In this case, RAM never responded to Mr. Newby's original claim for sablefish QS submitted on his RFA. It did not send him an application for sablefish QS; it did not advise Mr. Newby that the official record showed he was not eligible for sablefish QS; and it did not give Mr. Newby an opportunity to submit evidence contrary to the official record to establish his claim. Most important, RAM did not advise Mr. Newby that it had determined he was ineligible for sablefish QS. Mr. Newby could not have known from the non-issuance of sablefish QS, or from anything that RAM did or may have done, when his 60 days had begun for the filing of a timely appeal of his claim. Therefore, I find that RAM did not make or issue an IAD with regard to Mr. Newby's original claim for sablefish QS, for purposes of filing a timely appeal.

On October 3, 2003, RAM issued a written IAD with regard to Mr. Newby's claim for sablefish QS. The issuance of the IAD was the first time that an IAD had been issued with regard to Mr. Newby's claim for sablefish QS. Mr. Newby filed an appeal of the IAD within 60 days of the IAD. Therefore, I conclude that Mr. Newby's appeal filing period with regard to his claim for sablefish QS did not begin to run until October 3, 2003, and that he filed a timely appeal. Mr. Newby's claim for sablefish QS can be considered on appeal.

## **2. Does Mr. Newby qualify for sablefish QS, based on sablefish landings made by him in 1987?**

The Federal appeals court has ruled<sup>15</sup> that a qualified person for halibut QS under the IFQ program is entitled to sablefish QS, based on the person's highest total legal landings of sablefish during any five of six years between 1985 and 1990.<sup>16</sup> The court's ruling applies to all persons who qualify for halibut QS and who made at least one legal landing of sablefish during the years between 1985 and 1990. NMFS has not challenged the court's decision, nor has the decision been overruled by any other court. Therefore, the court's ruling must be applied by NMFS in this case.<sup>17</sup>

RAM claims that the issuance of sablefish QS to Mr. Newby would be unfair to other holders of

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<sup>14</sup>RAM acknowledges that "RAM's failure to provide the formal Application forms left Mr. Newby without guidance as to deadlines for protesting." IAD at 5.

<sup>15</sup>Wards Cove Packing Corp. v National Marine Fisheries Service, 307 F.3d 1214, 1219 (9<sup>th</sup> Cir. 2002).

<sup>16</sup>See 50 C.F.R. § 679.40(a)(4), for the calculation of sablefish QS for a qualified person of halibut or sablefish QS under the IFQ program.

<sup>17</sup>Under the same Federal appeals court's decision, Mr. Newby would have also been entitled to *halibut* QS, if he had been a qualified person for sablefish QS who had made at least one legal landing of halibut in 1987.

sablefish QS, and would frustrate the ability of RAM to implement the IFQ program.

In John T. Coyne,<sup>18</sup> we said:

Current QS holders, as a group, do not have standing to complain that the value of their QS would be diminished if RAM correctly calculates and issues QS to a successful appellant who meets all the qualifications for QS. It was always intended that successful appellants would be allowed to participate in the IFQ program. Issuing QS to such applicants would not unfairly diminish the interests of current QS holders. If anything, the current QS holders benefitted from a windfall by the absence of some qualified applicants from the 1995 QS pools.

We also said in that decision:<sup>19</sup>

The Council [North Pacific Fishery Management Council] anticipated and intended that RAM would take further administrative action when applicants are granted relief on appeal, and the IFQ regulations provide no deadline for deciding appeals. The Division's [RAM's] actions can include (and have, in fact, included) processing applications for the first time, correcting the official record, issuing new QS and enlarging the QS pools – all after the first calculation of IFQ for the 1995 fishing season. These Division's [RAM's] actions in response to appeals decisions are an integral part of program implementation, not a “serious compromise,” to implementation.

Mr. Newby is a qualified person for sablefish QS who made legal sablefish landings in 1987.<sup>20</sup> RAM is presently able to send an application for sablefish QS to Mr. Newby; to process his application; to correct the official IFQ record with regard to his claim for sablefish QS; to issue sablefish QS to him; and to enlarge the QS pool with regard to his eligibility for sablefish QS.<sup>21</sup> If anything, current holders of sablefish QS have benefitted from a windfall by the absence of Mr. Newby from the sablefish QS pool since 1995. I conclude that the issuance of sablefish QS to Mr. Newby would not be unfair to current holders of sablefish QS; nor would it frustrate the ability of RAM to implement the IFQ program.

As an appellant who meets all the qualifications for sablefish QS, I conclude that Mr. Newby is

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<sup>18</sup>Appeal No. 94-0012, Decision on Reconsideration, May 24, 1996, at 16.

<sup>19</sup>Id., at 15.

<sup>20</sup>IAD at 2.

<sup>21</sup>The QS pool for sablefish QS, and the IFQ of each qualified holder of sablefish QS, are calculated on January 31 of each year and the amounts fluctuate yearly based in part on the number of successful appellants for QS. See 50 C.F.R. 679.40©)(2).

entitled to sablefish QS based on the legal sablefish landings made by him in 1987.

#### FINDINGS OF FACT

1. Mr. Newby submitted a RFA for sablefish QS to RAM during the IFQ application period.
2. RAM never responded to Mr. Newby's original claim for sablefish QS; it did not send him an application for sablefish QS; it did not advise him that the official record showed he was not eligible for sablefish QS; it did not give him an opportunity to submit evidence contrary to the official record to establish his claim; it did not advise him that it had determined he was ineligible for sablefish QS; and Mr. Newby could not have known from the non-issuance of sablefish QS or from anything that RAM did or may have done, when his 60 days had begun for the filing of a timely appeal of his claim.
3. Mr. Newby filed an appeal within 60 days of an October 3, 2003, IAD that denied his claim for sablefish QS.
4. The Federal appeals court has ruled that a qualified person for halibut QS under the IFQ program is entitled to sablefish QS, based a person's highest total legal landings of sablefish during any five of six years between 1985 and 1990.
5. Mr. Newby is a qualified person for halibut QS who made legal sablefish landings in 1987.
6. RAM is presently able to send an application for sablefish QS to Mr. Newby, to process his application, to correct the official IFQ record with regard to his claim for sablefish QS, to issue sablefish QS to him, and to enlarge the QS pool with regard to his eligibility for sablefish QS; and current holders of sablefish QS have benefitted from a windfall by the absence of Mr. Newby from the sablefish QS pool since 1995.

#### CONCLUSIONS OF LAW

1. Mr. Newby made a timely claim for sablefish QS when he applied for sablefish QS under the IFQ program.
2. RAM did not issue an IAD with regard to Mr. Newby's original claim of sablefish QS, for purposes of filing a timely appeal.
3. Mr. Newby's appeal filing period with regard to his claim for sablefish QS did not begin to run until October 3, 2003, when he filed a timely appeal of a written IAD on that date.
4. Mr. Newby's claim for sablefish QS can be considered on appeal.
5. The issuance of sablefish QS to Mr. Newby would not be unfair to current holders of

sablefish QS and would not frustrate the ability of RAM to implement the IFQ program.

6. Mr. Newby is an appellant who meets all the qualifications for sablefish QS and is entitled to sablefish QS based on the legal sablefish landings made by him in 1987.

#### DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED. RAM is directed to issue sablefish QS to Mr. Newby based on legal sablefish landings made by him during 1987. This Decision takes effect on May 26, 2004, unless by that date of the Regional Administrator orders review of the Decision.

Any party or 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, on May 6, 2004. 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