

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0014
	)	
DAVID L. HALL,	)	DECISION
Appellant	)	
_____	)	September 1, 1998

STATEMENT OF THE CASE

Appellant David L. Hall filed a timely appeal of an Initial Administrative Determination [IAD] issued on February 6, 1995, by the Restricted Access Management Program<sup>1</sup> [RAM] of the National Marine Fisheries Service [NMFS]. The IAD denied his application for halibut quota share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish. The sole basis for the denial of the application was that it was not filed by the July 15, 1994 deadline. Mr. Hall's interests are directly and adversely affected by the IAD. No hearing was held because the facts are not in dispute.<sup>2</sup>

ISSUE

Was Mr. Hall's application timely filed?

BACKGROUND

Mr. Hall filed his application for QS with RAM on January 30, 1995. This was more than six months after the application filing deadline. Mr. Hall does not dispute that he missed the filing deadline. On appeal, Mr. Hall argues that his lateness should be excused because he moved from the state of Alaska in December 1987, and "eventually" settled in Blocksburg, California, which he describes as a "small, remote and rural community" that "has no access to electricity, running water, telephone, newspaper delivery or television communications available." [Appeal, ¶8]

Mr. Hall states that his application was late because he did not learn of the IFQ program and its filing requirements until January 1995, as a result of his isolation. He writes:

It was not through neglect that the deadline passed without my making proper application, but rather the fact that I did not have any knowledge, news or speculation that an IFQ program had been proposed and later adopted and that an application and

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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, 50 C.F.R. § 679.43(g), formerly 50 C.F.R. § 676.25(g).

acceptance was necessary and legally required in order for me to be allowed to participate in the halibut fishery. [Appeal, ¶17]

## DISCUSSION

The regulations implementing the IFQ program provide that an application received after July 15, 1994, “will not be considered.”<sup>3</sup> An RFA is the equivalent of an application for QS for purposes of meeting the IFQ filing deadline.<sup>4</sup> RAM accepted RFAs that were postmarked on or before July 15, 1994, as timely filed, even if they were not received until after that date.<sup>5</sup> In White, this Office stated that RAM interprets the filing deadline as requiring either delivery of an RFA to the agency by the deadline or decisive action by the applicant by the deadline to complete the filing, as by depositing an RFA in the mail.<sup>6</sup>

Where, as here, the applicant has not taken any decisive action to complete the filing by the deadline, we have granted relief only if we concluded as a matter of law that the applicant nonetheless filed a timely application. The cases in which we have made such a conclusion have involved factual situations that provided a legal basis for granting relief.

For example, in a few decisions, this Office has applied the doctrine of equitable tolling where an applicant was prevented from filing a timely appeal due to extraordinary circumstances beyond the person’s control.<sup>7</sup> In this appeal, however, Mr. Hall has shown no extraordinary circumstances beyond his control that prevented him from filing his application for QS in a timely manner. Mr. Hall voluntarily absented himself from Alaska and from the mainstream of information distributed by RAM. He chose to live in a remote area where, according to him, access to the relevant information about the IFQ program and QS application filing deadline was difficult, if not impossible, to obtain. Commercial fishing is a highly regulated industry. A fisherman who is ignorant of developments in the regulation of the industry because he intentionally closes his eyes and ears cannot use that fact to excuse the late filing

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<sup>3</sup>59 Fed. Reg. 701, 702 (1994)

<sup>4</sup>*See*, Keith A. Buehner, Appeal No. 94-0001, September 26, 1994, *aff’d* March 2, 1995.

<sup>5</sup>Philip J. Smith Memorandum, July 26, 1994

<sup>6</sup>Michael B. White, Appeal No. 94-0009, January 17, 1995, at 4, *aff’d*, January 20, 1995.

<sup>7</sup>John T. Coyne, Appeal No. 94-0012, January 31, 1996; *decision on reconsideration*, May 24, 1996; Estate of Marvin C. Kinberg, Appeal No. 95-0035, August 1, 1997, *aff’d*, August 13, 1997; Christopher O. Moore, Appeal No. 95-0044, September 5, 1997, *aff’d*, September 9, 1997.

of an application for QS.<sup>8</sup> The doctrine of equitable tolling does not apply in this case.

As a second example, in Brosman, we granted relief to a late applicant who, like Mr. Hall, was outside the mainstream of information distributed by RAM.<sup>9</sup> But Brosman is distinguishable from this case because RAM had in its possession sufficient information about Mr. Brosman to have given him actual notice of the IFQ program prior to the filing deadline, and RAM knew, or had reason to know, that Mr. Brosman would be interested in applying for QS.<sup>10</sup> Those facts are missing in this appeal.

The fact that an applicant was not given actual, individualized notice of the IFQ program and the application filing deadline is not grounds for granting relief where the applicant has missed the filing deadline. The regulations do not require that RAM give individualized notice to every person who might be eligible to receive QS.<sup>11</sup> Nor does “due process” require that every applicant for QS receive actual notice of the IFQ program and its filing requirements. Publication of the IFQ program regulations in the Federal Register suffices for due process purposes.<sup>12</sup> Nevertheless, RAM did publicize<sup>13</sup> the IFQ program, and attempted to reach every person that it knew might be a likely applicant for the program. RAM did not send Mr. Hall an unsolicited Request for Application [RFA] packet, as it did with other potential applicants, because RAM had no record that Mr. Hall had owned

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<sup>8</sup>*See, also, Richard D. Foss*, Appeal No. 95-0003, August 6, 1996, in which we similarly concluded that the doctrine of equitable tolling did not apply where the Appellant had voluntarily absented himself from Alaska and placed himself in a location where he was isolated from information concerning the IFQ program.

<sup>9</sup>Wayne H. Brosman, Appeal No. 94-0007, January 10, 1995, *aff'd*, January 13, 1995.

<sup>10</sup>*Id.*, at 4.

<sup>11</sup>Samuelson and Vasileff, Appeal No. 94-0011, September 18, 1995. By contrast, some other agencies are statutorily required to provide actual notice of the application period for certain federal benefits. *See, e.g.*, 38 U.S.C. § 7722, cited in Smith (Edward F.) v. Derwinski, 2 Vet. App. 429, 432-33 (1992).

<sup>12</sup>Under the doctrine of constructive notice, an agency is entitled to consider publication of its regulations in the Federal Register as giving effective notice to the public.

<sup>13</sup>The publicity included numerous news releases, public service announcements, paid advertisements, media interviews, public information workshops, and presentations at public meetings in the state of Alaska and the Seattle, Washington area. For details, see August 14, 1994, memorandum of Philip J. Smith, chief of RAM, entitled, “Public Information Regarding the IFQ Program and the July 15, 1994, Deadline for Submission of Requests for Application of Quota Share.”

or leased a vessel during the QS qualifying years.<sup>14</sup>

Under the facts of this case, we find no basis for granting the Appellant relief from the denial of his application on the grounds that it was not timely filed.

#### FINDINGS OF FACT

1. Mr. Hall voluntarily absented himself from Alaska and from the mainstream of information distributed by RAM.
2. Mr. Hall has shown no extraordinary circumstances beyond his control that prevented him from filing his application for QS in a timely manner.

#### CONCLUSIONS OF LAW

1. The doctrine of equitable tolling does not apply in this case.
2. The fact that an applicant was not given actual, individualized notice of the IFQ program and the application filing deadline is not grounds for granting relief where the applicant has missed the filing deadline.
3. Mr. Hall's application for QS was not timely filed.

#### DISPOSITION

The IAD denying Mr. Hall's application as untimely is **AFFIRMED**. This Decision takes effect October 1, 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 by this Office not later than 4:30 p.m., Alaska Time, on the tenth day after the date of this Decision, September 11, 1998. 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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<sup>14</sup>In December 1993 and January 1994, RAM mailed between 5,000 and 6,000 RFAs to persons listed in its database who appeared to be potential applicants for QS. RAM had no record of Mr. Hall owning a fishing vessel during the QS qualifying years of 1988, 1989, 1990, and hence, was not in a position to know about Mr. Hall's interest in applying for the program.

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Randall J. Moen  
Appeals Officer

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Edward H. Hein  
Chief Appeals Officer