

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 95-0019
)
JUBILEE FISHERIES, INC.,) DECISION
Appellant)
)
)
September 8, 1998
_____)

STATEMENT OF THE CASE

The Appellant Jubilee Fisheries, Inc., filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program¹ [RAM] on December 4, 1994. The IAD denied a portion of the total poundage claimed as sablefish Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish because the poundage was not based on the Appellant's best five of six years of landings during the QS base period (1985-1990). The Appellant's interests are directly and adversely affected by the IAD.

ISSUE

When calculating Appellant's sablefish QS, must RAM use the best five years of landings for both of the Appellant's vessels combined, or can RAM credit each vessel's landings separately if that would be more beneficial to an applicant?

DISCUSSION

IFQ regulation 50 C.F.R. § 679.40(a)(4)(ii)² provides:

The Regional Administrator shall calculate the sablefish QS for any qualified person in each IFQ regulatory area based on that person's highest total landings of sablefish in each groundfish reporting area for any 5 years of the 6-year sablefish QS base period 1985-1990.

The Appellant corporation owned two vessels from which sablefish landings were made during the QS base period. During this period, the best five years of landings for the F/V ZENITH were 1985-1989 [5,548,903.03 pounds]; the best five years for the F/V KJEVOLJA were 1986-1990 [7,177,082.55

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. § 676.20(b).

pounds]. The combined landings for both vessels for these periods totaled 12,725,985.85 pounds.

RAM calculated the Appellant's QS by combining the landings from both vessels for each year. It based the QS award on the best five years of these combined landings, which were 1986-1990. Under this method of calculation, the landings totaled 12,448,719.44 pounds, or 277,266.95 pounds fewer than the Appellant claims.

The Appellant asks that its preferred method of calculation be used, so that its QS would be based on each individual vessel's best five years of landings. If this were done, the Appellant's total qualifying pounds of landings would increase by 2 percent.

The regulations, however, do not authorize RAM to calculate QS according to the method requested by the Appellant. The regulations provide for QS to be calculated according to a qualified *person's* best five years of landings, not *each vessels'* best five years of landings. Although the IFQ program counts the pounds landed from each *vessel*, the credit for those pounds goes to the *person* who owned or leased the vessel at the time of the landings. RAM calculates sablefish QS for each applicant by adding up that *person's* highest total landings of sablefish. As RAM pointed out in the IAD, at 3, the Appellant's approach to calculating QS overlooks the fact that QS is issued to qualified persons, not to vessels. We believe RAM's reading of the regulation is the correct and only permissible reading.

The Appellant asserts that RAM's method of calculation is contrary to the intent of the North Pacific Fishery Management Council. Appellant reasons that by allowing applicants to select their best five years of landings from the six-year base period, the Council expressed an intent that NMFS maximize the number of pounds credited to each applicant. The Appellant asks that NMFS follow the Council's intent and use this alternative method of calculating QS in this case so that Appellant receives credit for additional pounds of sablefish landings.

As RAM pointed out in the IAD, at 3, "The Council may have had many reasons for allowing persons to use their 'best five of six years,' but the 'maximization of . . . qualifying poundage' does not appear to be, at least explicitly, among them." Indeed, the Appellant has not pointed to any such expressed intent by the Council in the regulatory history of the IFQ program. The regulatory history and the language of the regulation do not support the view that RAM has the discretion to use a different method of calculating QS on a case-by-case basis in order to maximize each applicant's QS amount.

The Appellant also points out that if it had owned these vessels under separate corporations, as many other applicants did, it would have received the additional credit it seeks. Appellant argues that RAM's refusal to use this different method of calculation represents an artificial and arbitrary distinction between applicants based on the way the vessels were owned, which unfairly discriminates against the Appellant. [Appeal, at 1-2]

This argument ignores the fact that where vessels are owned by different corporations, even corporations that have identical owners, each vessel is owned by a distinct and different legal person. Each such corporation must apply for QS separately, each will be a separate “qualified person,” and each will receive its own QS. The fact that some individuals placed the ownership of their vessels in the hands of a single corporate entity, while others used multiple entities, was the result of business choices made before the inception of the IFQ program. The Council merely decided that each qualified vessel owner (or lessee) would receive its own QS, and that, when calculating QS for each regulatory area, the landings from all vessels belonging to a single owner would be lumped together. Although the amount of QS issued to a qualified person can be affected by the number of vessels the person owned, we do not find that the allocation scheme is arbitrary. Whether, in adopting such a scheme, the Council was unfair is not for this Office to judge.³

FINDINGS OF FACT

1. Although the IFQ program counts the pounds landed from each *vessel*, the credit for those pounds goes to the *person* who owned or leased the vessel at the time of the landings. RAM calculates sablefish QS for each applicant by adding up that *person's* highest total landings of sablefish.
2. RAM calculated the Appellant's QS by combining the landings from both of Appellant's vessels for each year.
3. Using Appellant's preferred alternative method of calculating QS would increase the total qualifying pounds of sablefish landings by 2 percent.

CONCLUSIONS OF LAW

1. The IFQ regulations do not authorize RAM to calculate QS according to the method requested by the Appellant.
2. The regulations provide for QS to be calculated according to a qualified *person's* best five years of landings, not *each vessels'* best five years of landings.
3. RAM's reading of 50 C.F.R. § 679.40(a)(4)(ii) is the correct and only permissible reading.
4. RAM does not have the discretion to use a different method of calculating QS on a case-by-case basis in order to maximize each applicant's QS amount; QS must be calculated as provided in the IFQ

³See, George M. Ramos, Appeal No. 94-0008, Decision on Review, April 21, 1995, at 4, states: “[I]t is wholly inappropriate for an administrative appeals officer to pass judgment on either the validity or wisdom of such policies.”

regulations.

DISPOSITION

The IAD, which denied Appellant's request to have its QS calculated on the basis of the combined sum of each of its vessels best five years of landings, is **AFFIRMED**. This Decision takes effect on October 8, 1998, unless, by that date, the Regional Administrator orders the 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 18, 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. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of Decision on Reconsideration.

Randall J. Moen
Appeals Officer

Edward H. Hein
Chief Appeals Officer