NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0115
	)	
LEONARD LEACH,	)	ORDER DENYING REQUEST
Appellant	)	FOR RECONSIDERATION
	)	
_____	)	August 3, 1998

On May 22, 1998, Mr. Leach submitted a Motion for Reconsideration and reversal of the Decision in this Appeal, issued May 6, 1998. He also filed (through his attorney) a supplement to the Motion for Reconsideration on June 2, 1998. For the reasons stated below, Mr. Leach's request is DENIED.

The standard for reconsideration is whether the requesting party has raised a material matter of fact or law that the Appeals Officer has overlooked or misunderstood. Mr. Leach asserts in his motion that the Appeals Officer did not consider certain facts that show that the offloading of fish had begun before the F/V TRISH sank. Mr. Leach claims, in essence, that the "offloading" of fish began when control of the vessel was passed to the F/V WESTWARD for the purpose of retrieving the halibut. Mr. Leach writes (in relevant part):

> I made an effort to unload these fish two times; once at Pt. Baker to Herb Hoyt, the other time, when E.C. Phillips sent their 80' tender WESTWARD 40 miles to unload the fish off the F/V TRISH after it had rolled over. The fact is, I was no longer in possession of the fish. I was aboard the HARVEY O along with my crew. The WESTWARD had the TRISH along side with a tow line, pulling into calmer water to unload it when the lines broke the TRISH sank. All of this was witnessed by the crew of the U.S. Coast Guard's Cape Hatteras.

Mr. Leach submitted a letter from Mr. Michael Cusack, on behalf of E.C. Phillips & Son, stating that the company used the F/V WESTWARD to assist in the "salvage" of the F/V TRISH and its fish, and that if the salvage had been successful, the fish [from the F/V TRISH] would have been delivered to the company.

The Decision does not mention the alleged attempts to salvage the fish. The Decision concludes only that fish lost with the sinking of a vessel have not been landed for IFQ purposes.

Under the IFQ regulations, "landing" is defined as "offloading fish." [50 C.F.R. § 679.2] This definition means more than the mere intention or attempt to offload fish. If NMFS wished to consider the mere intent to offload or the beginning of offloading as constituting a landing, the agency certainly knows how to do so. *C.f., e.g*, the definitions NMFS has used elsewhere in Title 50 of the regulations: "Land or landing means to begin offloading any fish, to arrive in port with the intention of offloading any fish, or to

cause any fish to be offloaded." [50 C.F.R. § 300.101] "Land means to begin offloading fish, to offload fish, or to enter port with fish." [50 C.F.R. § 697.2] In the context of these other definitions of "landing" that NMFS has used, the definition of "landing" in the IFQ regulations can only mean fish that has actually been offloaded from the vessel.

The evidence in this case shows that an "offloading" of fish was never accomplished. The vessel was merely brought aside and towed by another vessel, with the intention of offloading. These were only initial steps in preparation for offloading fish. Therefore, the facts as alleged by Mr. Leach, even if true, do not show that a "landing" of fish occurred.[1]

Contrary to Mr. Leach's argument [Supplement to Motion, at 3], the transfer of control of the vessel that holds the fish is not the same as offloading the fish from the vessel. Therefore, the fish were not landed when the F/V TRISH was placed under tow of the F/V WESTWARD.

Mr. Leach argues that Restricted Access Management [RAM] recognizes that a landing can occur prior to completion of the offloading process. [Supplement to Motion, at 3] He cites as an example the fact that fish harvested and processed on a catcher/processor vessel are considered to be landed for IFQ purposes when they are processed, even though they have not yet been transferred from the vessel. This was noted in the Decision as the only exception to the offloading requirement, but this exception does not apply to the F/V TRISH, which was not a catcher/processor vessel.

Mr. Leach also asserts that the cases cited in the Decision have nothing in common with his own case. [Motion, at 1] While the facts in the cases cited in the Decision [n.6, at 2] are different from the facts in Mr. Leach's appeal, all of these cases involved an appellant who sought credit for landings that were never made. The principle of law which those other cases represent does apply in this case. That is, NMFS has authority to issue quota shares only on the basis of actual landings, and not on the basis of landings that might have been made but for an unavoidable circumstance or hardship.

Mr. Leach states that an oral hearing should have been held to examine the credibility of Mr. Ted Case and Mr. Herb Hoyt, who could have established the existence and weight of Mr. Leach's claimed fish. [Motion, at 1-2] The credibility of Mr. Leach's witnesses is not at issue here. Because I have concluded that the fish alleged to have been aboard the F/V TRISH when it sank were never landed and, therefore, cannot receive IFQ credit, the question of whether and how much fish were actually aboard is moot and need not be resolved. Therefore, a hearing was unnecessary in this Appeal.

The effective date of the Decision, originally set at June 5, 1998, was stayed by my Order dated May

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[1]The definition of "landing" for IFQ purposes leaves open the possibility that fish salvaged from a sunken vessel could still be offloaded and landed if the harvesting and landing are in compliance with all applicable legal requirements.

29, 1998. The new effective date of the Decision is September 2, 1998, unless by that date the Regional Administrator orders review of the Decision.

Randall J. Moen
Appeals Officer