NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 07-0002
	)	
SIGURD D. RUTTER,	)	DECISION ON RECONSIDERATION
Appellant	)	
	)	October 15, 2007
	)	

STATEMENT OF THE CASE

This office issued a Decision in this appeal on July 6, 2007. In the Decision, we concluded that the Restricted Access Management (RAM) Program of the NMFS Alaska Region properly calculated Sigurd D. Rutter's 2007 halibut Individual Fishing Quota (IFQ) allocation under the Pacific halibut and sablefish IFQ program.[1] Consequently, we also concluded that Mr. Rutter is not entitled to an additional 285 pounds of underage adjustment to his 2007 halibut IFQ account.

Mr. Rutter filed a Motion for Reconsideration on July 12, 2007. In the motion Mr. Rutter asserts that in the Decision the OAA Administrative Judges erred with regard to the number of IFQ pounds in dispute. He also alleges in the motion that we disregarded language printed on the Application for Transfer of QS/IFQ form (transfer application) that, he argues, allows him to elect to retain his entire underage from 2006 as an adjustment to his 2007 IFQ allocation.

In an order issued July 17, 2007, we granted Mr. Rutter's motion and stayed the August 6, 2007, effective date of the Decision, pending issuance of a Decision on Reconsideration. We granted the motion in order to revisit our understanding of the manner in which RAM interprets the underage regulation,[2] and calculates and assigns underage adjustments. We also wanted to reexamine whether the transfer application authorizes Quota Share (QS) sellers to retain or transfer an underage adjustment, or any part of it, for the next fishing year.

In another letter, received in this office on July 17, 2007, Mr. Rutter raised additional questions about whether RAM has been inconsistent in its implementation of QS and IFQ transfers and in its interpretation of language in the transfer application form and the accompanying instructions. In particular, Mr. Rutter points to Block F of the transfer application form and to RAM's handling of a QS/IFQ transfer and IFQ account underage adjustment several years ago involving his wife, which was the subject of our decision in the *Mary Ann Coulter* appeal.[3]

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[1] 50 C.F.R. §§679.40 - 679.45.

[2] 50 C.F.R. §679.40(e).

[3] *Mary Ann Coulter,* Appeal No. 02-0010 (Dec. 29, 2004).

An oral hearing was held in this matter on September 19, 2007. Mr. Rutter attended via telephone from his home in Sitka, Alaska. Attending in person were Ms. Jessica Gharrett, acting program administrator of RAM, and Ms. Tracy Buck, supervisory permit specialist at RAM. Judge Edward Hein presided at the hearing, and Judge Randall Moen attended. The administrative record contains sufficient information to decide this appeal, as required by 50 C.F.R. §679.43(g)(2). The record is closed.

ISSUE

Did RAM properly calculate Mr. Rutter's halibut IFQ underage adjustment for the 2007 season?

ANALYSIS

1. Background

In the fall of 2006, Sigurd Rutter sold to Mark Roberts a block of halibut Quota Share consisting of 33,881 units for regulatory area 2C. In the transfer application, Mr. Rutter specified that he was not transferring any of his IFQ pounds for the 2006 fishing year. RAM reviewed the transfer and approved it on November 13, 2006, two days before the end of the 2006 commercial halibut fishing season. Not part of the transfer was another block of halibut QS, consisting of 87,291 units for area 2C, which Mr. Rutter retained.

At the end of the 2006 halibut season Mr. Rutter had an IFQ account balance of 1,021 un-fished pounds, which represented less than five percent of the total 2C halibut pounds he was authorized to fish that year. For the 2007 season RAM initially, and erroneously, credited Mr. Roberts's IFQ account with the entire 1,021 pounds as an underage adjustment. They gave Mr. Rutter no underage adjustment.

On February 12, 2007, RAM issued to Mr. Rutter an IFQ annual fishing permit authorizing him to fish 12,474 pounds of halibut for the 2007 season. That amount was based solely on the block of 2C halibut QS that Mr. Rutter still held on January 31, 2007, a date specified by federal regulation.[4] When he received his permit, Mr. Rutter telephoned RAM and inquired why he had not received an underage adjustment. Two days later RAM issued a letter informing Mr. Rutter and Mr. Roberts that it had made an error in calculating the underage adjustments in both of their 2007 IFQ accounts. To rectify the error, RAM deducted 736 pounds from Mr. Roberts's account and added it to Mr. Rutter's account. RAM enclosed a revised 2007 IFQ halibut permit with each man's letter. Ms. Jessica Gharrett of RAM wrote that "I sincerely regret any inconvenience this situation may have caused."

[4] 50 C.F.R. §679.40(c)(2) provides: "For purposes of calculating IFQs for any fishing year, the amount of a person's QS and the amount of the QS pool for any IFQ regulatory area will be the amounts on record with the Alaska Region, NMFS, as of 1200 hours, A.l.t., on January 31 of that year."

On appeal, Mr. Rutter argues that RAM still has his underage adjustment wrong. He says that he should have received all 1,021 pounds as his underage adjustment for 2007, and that Mr. Roberts should not have received any of those pounds. He wants 285 more pounds removed from Mr. Roberts's account and added to his own account.

2. RAM's calculation of underage adjustments

Critical to this case is an understanding of how RAM calculated the underage adjustment to Mr. Rutter's 2007 IFQ account, and specifically how RAM determined that he should receive an adjustment of only 736 pounds, rather than the 1,021 pounds he claims he deserves.

Underage is the amount of a QS holder's annual IFQ allocation that was not fished during the season for which it was authorized.[5] Federal regulation 50 C.F.R. §679.40(e) governs who should receive underage adjustments and the amounts of those adjustments. The regulation provides:

> (e) Underages. Underages of up to 10 percent of a person's total annual IFQ account for a current fishing year will be added to that person's annual IFQ account in the year following determination of the underage. This adjustment to the annual IFQ allocation will be specific to IFQ species, IFQ regulatory area, and vessel category for which an IFQ is calculated, and will apply to any person to whom the affected IFQ is allocated in the year following determination of an underage.

At first glance, Mr. Rutter's position might seem to be supported by the opening sentence of this regulation. Because it provides that an underage of up to 10 percent of a person's account will be added to *that person's* account in the following year, a reader might assume that an underage adjustment automatically goes only to the person who had pounds remaining in their account at the end of the year.

The second sentence of the regulation, however, contains another requirement that RAM must follow, namely, that an underage adjustment "will apply to any person to whom the affected IFQ is allocated in the year following determination of an underage." RAM interprets this to mean that any underage adjustment goes to the person who holds the associated QS units, i.e., the QS that generated the previous year's IFQ allocation which resulted in the underage. In other words, the adjustment must go to the new QS holder (the buyer) if the QS is transferred. So, if a QS holder retains the QS until January 31 of the next year, RAM adds any underage adjustment to that person's IFQ account for the new year. But if QS is transferred before January 31 of the next year, RAM makes the underage adjustment to the transferee's (buyer's) account when the next year's IFQ is allocated.

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[5] *Mary Ann Coulter,* Appeal No. 02-0010 at 2 (Dec. 29, 2004).

This case raises the question of what the underage regulation requires when a person holding two blocks of quota share transfers one block and keeps the other, and also retains for his own use all the pounds for the current year that were derived from both QS blocks. RAM determined that, when a person transfers away some of his quota share units, the underage regulation requires RAM to give the buyer a proportionate share of the underage adjustment for the next season.

In calculating Mr. Rutter's underage adjustment for the 2007 season, RAM first determined that at the beginning of the 2006 season Mr. Rutter held two QS blocks totaling 121,172 QS units. The larger block (87,291 units) constituted 72 percent of his total QS units; the smaller block (33,881 units) constituted 28 percent of his total QS units. RAM apportioned the 1,021 pounds remaining in Mr. Rutter's account between the two QS blocks. RAM attributed 72 percent of those pounds, i.e., 736 pounds, to the larger block, and 28 percent of those pounds, i.e., 285 pounds, to the smaller block. RAM then awarded these pounds as underage adjustments to the holders of the respective QS blocks, as of noon on January 31, 2007.

3. Mr. Rutter's objections

On reconsideration, Mr. Rutter raises four main objections that were either not addressed, or not addressed adequately, in the Decision. We summarize these as follows:

> (1) Mr. Rutter asserts that the 1,021 pounds remaining in his 2006 account all derived from his larger QS block; that he had fished the pounds from the smaller block first and had sold that block to Mr. Roberts as "fished quota share." He also asserts that because he did not sell any of his 2006 IFQ pounds to Mr. Roberts as part of the QS transfer, Mr. Roberts is not entitled to any of the underage.
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> (2) Mr. Rutter argues that language in the transfer application and the accompanying instructions authorize sellers and buyers of QS to instruct RAM how to award underage adjustments to their IFQ accounts for the year following the transfer. He asserts that he specifically instructed RAM that his 1,021 pounds of underage were not to be shared with Mr. Roberts on a pro-rata basis for 2007, but that RAM ignored his instructions.
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> (3) Mr. Rutter asserts that RAM has been inconsistent and arbitrary in calculating underage adjustments. He contrasts RAM's handling of his wife's underage adjustment in 2002 with RAM's handling of his own in this case.
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> (4) Mr. Rutter argues that RAM's policy of pro-rating underage adjustments between the buyer and seller of quota share is impermissible because it is contrary to the purposes of the underage provision. He says that by taking away some of his underage adjustment, RAM removes his incentive to leave an underage in his account and forces him to fish every last pound in his account in order to avoid losing any pounds.

We will now address each of these objections in turn.

(1) "Fished quota share does not generate an underage adjustment to the buyer."

Mr. Rutter has stated repeatedly that he sold "fished quota share" to Mr. Roberts. For example, in his appeal filing he wrote: "Roberts bought 'fished' QS. There was no underage associated with the block of QS he purchased."[6] When asked at the oral hearing what he meant by "fished" QS, Mr. Rutter said that "the quota in question had already been harvested."[7] He then confirmed that he meant that all of the pounds generated by the smaller QS block for 2006 had already been harvested by the time of the transfer, and that none of the 1,021 pounds left in his account were associated with the QS block he sold to Mr. Roberts.[8]

Mr. Rutter added that "insofar as I had already harvested those pounds, identified those pounds as having been harvested, this should have been considered a complete transfer."[9] "I sold him [Mr. Roberts] no pounds. Okay, now, for him to get an underage generated in 2007, it would be an indication that I sold him some unfished pounds, and that was not the case."[10]

Mr. Rutter asserts that he fished all of the smaller block's pounds first, then fished the larger block's pounds: "That's what I'm saying because once the pounds are fished they don't contribute to an underage or an overage."[11] Mr. Rutter wrote that "there is [sic] no unfished pounds attached to Roberts' account, on which to base an underage calculation."[12]

We find the assertions here to be without merit. First, Mr. Rutter cannot fish one block of quota share before the other. There is no mechanism to do that. Merely asserting that he did so doesn't make it so. Even if that was Mr. Rutter's actual subjective intent, RAM need not, and does not, give effect to a fisherman's subjective intent about the order in which pounds were fished.[13] We interpret Mr. Rutter's claim as a request that RAM treat his IFQ account *as if* he

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[6]Rutter Appeal at 2 (Feb. 24, 2007).

[7]Hearing tape at 1A/158.

[8]Hearing tape at 1A/166-174; 183-185.

[9]Hearing tape at 1A/166-174.

[10]Hearing tape at 1B/133-151.

[11]Hearing tape at 1A/183-185.

[12]Motion for Reconsideration at 2 (July 9, 2007).

[13]Ms. Buck testified that RAM gives no significance to the term "fished QS." "We don't recognize that term as having any meaning in our actions, for purposes of transfers or calculating permits." Hearing tape at 2B/276-287.

had fished the smaller block first and *as if* all the 1,021 remaining pounds came from the larger QS block. Those pounds are actually the remainder from the commingled pool of 23,303 "Fishable IFQ pounds" derived from both QS blocks in 2006. RAM presumes that both QS blocks contributed proportionately to the 1,021 pounds remaining in Mr. Rutter's account. That is a reasonable and an irrebuttable presumption.

Second, Mr. Rutter's understanding of "complete" and "incomplete" transfers is wrong. The terms complete and incomplete transfers are not in the IFQ regulations. They were devised by RAM administratively to assist them in correctly calculating underage and overage adjustments. Ms. Gharrett explained at the hearing that a complete transfer requires a QS seller to transfer to the buyer all the QS/IFQ pounds that were generated by those QS units for the current year. Only then would the buyer have no claim to any of the remaining balance in the seller's account.[14]

In this case, Mr. Rutter would have had to transfer at least 6,056 pounds to Mr. Roberts with the QS block in order to have a complete transfer.[15] If Rutter had done so, he could have kept the entire 1,021 pounds of underage adjustment for 2007.[16] Because Mr. Rutter transferred less than 6,056 pounds – in fact, no pounds – to Mr. Roberts, the transfer was incomplete. Mr. Rutter's assertion that he sold "fished" QS to Mr. Roberts, even if true, would not make this a complete transfer. Mr. Roberts did not have to buy any pounds as part of the QS transfer in order to get a 2007 underage adjustment. He gets it by operation of law because he bought the QS units.[17]

Third, we conclude that the underage provision requires RAM to give Mr. Roberts an underage adjustment because he held the smaller QS block on January 31, 2007. RAM is also required (by the same regulation) to give Mr. Rutter an underage adjustment because he owned the larger QS block on January 31, 2007. In order to comply with these dual requirements, RAM must split the underage adjustment between the two QS holders. We conclude that apportioning the underage adjustment into pro-rata shares based on the relative sizes of the QS blocks is a reasonable and fair method of complying with the underage regulation in this case.

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[14]Hearing tape at 2B/425-444. It would also be a complete transfer if the seller retained no QS units and no pounds, though that was not the situation in this case.

[15]Both of Mr. Rutter's QS blocks combined generated 21,629 QS/IFQ pounds in 2006. The smaller QS block generated 28 percent of those pounds, i.e., 6,056 pounds.

[16]Obviously, Mr. Rutter would have had to do so earlier in the season, as there were only 1,021 pounds remaining in his IFQ account at the time of the transfer, November 13, 2006.

[17]Mr. Rutter values the 285 pounds Mr. Roberts received at $4.65 per pound, for a total value of $1,325.25. Motion for Reconsideration at 4 (July 9, 2007). Although Mr. Rutter did not wish to sell any pounds to Mr. Roberts for his use during the 2006 season, Mr. Rutter presumably could have provided in the sales agreement that he would be compensated by Mr. Roberts for any underage adjustment Mr. Roberts might receive as a result of buying the QS block. Such provisions are apparently common in QS sales agreements. See, "The business of IFQs," *National Fisherman* at 4 (Oct. 2007).

(2) "Parties to a QS transfer can direct RAM how to award their underage adjustments."

Here Mr. Rutter focuses on specific language in the transfer application and the accompanying instructions. He points to page 2, Block F, box 7 of the form.[18] In Block F the parties to the transfer are supposed to identify the QS units to be transferred, and the number of pounds, if any, to be transferred with the QS units. Box 7 contains, among other information, the following preprinted sentence in bold type: "Pounds transferred includes [sic] a pro-rata share of any underage based on the QS held or transferred UNLESS OTHERWISE INSTRUCTED."

What does this sentence mean? Mr. Rutter contends that this sentence explicitly gives the parties to a QS transfer the authority to instruct RAM who should get the benefit of any pounds that may be left in the seller's IFQ account at the end of the season in which the transfer is made. He also points to RAM's instructions for completing box 7, which include the following sentences: "The current QS holder may retain underage pounds. However, unless otherwise specified, the underage associated with the QS will be transferred. Please indicate your specific intention."[19]

Mr. Rutter asserts that by crossing out the sentence about pro-rata share of underage on the transfer application, and by indicating on the form that "no associated pounds for the 2006 fishery" were being transferred with the QS block, he was instructing RAM not to pro-rate his 1,021 pounds and not to give Mr. Roberts any part of Mr. Rutter's 2007 underage adjustment.[20] He argues that RAM erred by "disregarding the instructions provided by the parties at Block F."[21]

Ms. Gharrett states that the sentence in question in box 7 refers to any underage adjustment that was added to the seller's account for the current season as a result of underfishing during the previous season.[22] She also testified that people use the word "underage" in different ways, but that in this sentence "it refers to the underage adjustment that's part of the IFQ account that is the subject of the transfer."[23]

At the hearing, Judge Hein asked Ms. Gharrett:

> Q: How, in your opinion, would a transfer applicant know that the phrase "any

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[18]Application for Transfer of QS/IFQ (rev'd. 6/23/2005).

[19]Application for Transfer of QS/IFQ at 6-7 (rev'd. 6/23/2005).

[20]Hearing tape at 1B/162-170.

[21]Motion for Reconsideration at 4 (July 9, 2007).

[22]Jessica Gharrett email to Ed Hein (July 5, 2007).

[23]Hearing tape at 1B/512-516.

> underage" in the second sentence does not refer to "any underage or unfished pounds that might be left in the transferor's account at the end of the fishing season"? How would a person know that the form refers to the underage adjustment that they already received, as opposed to any underage that they might have left at the end of the season?
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> A: I think it's intuitive that you only refer, at the time of a transfer, to the pounds . . . that exist at that time.[24] At the time of a transfer, an IFQ account of the seller or donor, whatever, consists of quota share pounds awarded for that year, and adjustment pounds awarded from the prior year. And let's assume there have been no other transfers, in or out. Pounds that might result from the final fishing balance on that permit at a future date are unknown – whether the account will have a positive balance, negative balance, or zero. And next year's adjustment has not yet been computed and does not exist at that time. [25]

Ms. Gharrett testified that the purpose of the sentence in box 7 is to inform transfer applicants that they have a choice about how many of their adjustment pounds to transfer with QS/IFQ pounds as part of the QS transfer.

> They actually have a choice, and can instruct otherwise, or else we will assume that the maximum number of pounds that could transfer with the quota share units is being transferred. The fact is, a person can choose to transfer the pounds that would go with that quota share and, if they have adjustment pounds from the prior year, a portion of that as well.[26]

Ms. Gharrett also testified that parties to a quota share transfer do not have the ability on the application to instruct RAM how to make any underage adjustment for the following year.[27]

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We think that the sentence in question in Block F, box 7 of the transfer application is ambiguous and not particularly well drafted, and may be misleading. Nonetheless, we are satisfied that the

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[24]While it is true that the 1,021 pounds actually existed in Mr. Rutter's account at the time of the transfer, RAM did not consider those pounds to be an underage until January 31, 2007, because, as Ms. Buck and Ms Gharrett testified, an IFQ account balance can continue to change until that date, due to additional fishing, late reporting, transfers, and adjustments required by the NMFS Enforcement Division. Ms. Gharrett stated: "Generally, to be accurate, we refer to it as remaining balance [not underage]." Hearing tape at 2A/310-421.

[25]Hearing tape at 1B/555-565.

[26]Hearing tape at 2A/011-029.

[27]Hearing tape at 2B/504-542.

sentence refers to whether or not underage adjustment pounds are to be transferred with QS/IFQ pounds as part of the QS transfer. Box 7, after all, asks whether the seller wants to transfer "pounds for the current fishing year." It does not ask whether the seller wants to transfer an underage adjustment for the next year – something that does not yet exist at the time of transfer.

The instructions for completing Block F, box 7, are also somewhat confusing, and apparently did confuse Mr. Rutter. Yet, we think the instructions actually support our view of how the sentence on the form should be read. Although the instructions say that "the current QS holder may retain underage pounds," they also say that, "unless otherwise specified, the underage associated with the QS will be transferred." Logically, underage that will be transferred with the QS can only mean underage adjustment pounds that will be transferred at the time of a QS transfer. The instructions cannot be talking about the calculation and awarding of an underage adjustment the following year, since the amount of any underage or underage adjustment is not known until January 31.

We find that the sentence in question in box 7 states a presumption RAM will make that in the event QS/IFQ pounds *are* sold with the QS units, a proportionate share of adjustment pounds will be transferred with the QS/IFQ pounds, unless the parties instruct otherwise. This provision gives the seller the option of retaining some or all of his adjustment pounds for use during the current fishing year. In this case, however, Mr. Rutter transferred none of his pounds with the QS units. At the hearing, Mr. Rutter and Ms. Gharrett both agreed that the sentence in box 7 does not apply to a situation, like this one, where no pounds were transferred with the QS units.[28] Consequently, Mr. Rutter's crossing out the sentence on the form was unnecessary.

The underage regulation governs the calculation and awarding of underage adjustments. The language on the transfer application and in the accompanying instructions are merely advisory and do not have the force of law. Even if they could be read to be in conflict with the underage regulation, the regulation would govern. We think it clear that, as a matter of law, Block F, box 7 of the transfer application does not authorize QS sellers and buyers to determine the calculation and awarding of underage adjustments.

(3) "RAM has been inconsistent and arbitrary in calculating underage adjustments."

Mr. Rutter asserts that RAM calculated the 2002 underage adjustment of his wife, Ms. Mary Ann Coulter, in a different way than they calculated his own underage adjustment for 2007. Implicitly he is arguing that RAM's calculation of his 2007 underage adjustment is unlawful.

Mr. Rutter notes that RAM issued a 2001 IFQ permit to Ms. Coulter after she purchased QS units and IFQ pounds in January 2002.[29] Mr. Rutter stated: "To be consistent, RAM should have issued Roberts and Rutter a new 2006 permit on the second to the last day of the 2006

[28]Hearing tape at 1B/216-218 and 2A/199-216.

[29]Hearing tape at 3A/377-391.

season."[30] When Mr. Rutter asked Ms. Buck about this at the hearing, she responded: "There were no changes to the accounts. There was no need to reissue a permit. Mr. Roberts got no more pounds added to his current [2006] account."[31]

We said in the *Coulter* Decision that RAM was not authorized to issue a permit to Ms. Coulter for 2001, a season that had already expired.[32] RAM could (and did), however, create a 2001 IFQ account for Ms. Coulter in January 2002, in order to calculate her underage adjustment for 2002. In this case, RAM properly did not issue new permits to Mr. Rutter or Mr. Roberts in November 2006 as a result of the QS transfer *because no pounds were transferred from Mr. Rutter's account or to Mr. Roberts's account.* The QS transfer caused no change in either party's 2006 IFQ account, and thus no change in their 2006 permits was necessary or appropriate. The fact that a new permit was issued to Ms. Coulter but not to Mr. Rutter or Mr. Roberts does not show that RAM was inconsistent or arbitrary in calculating Mr. Rutter's 2007 underage adjustment.

As Mr. Rutter is well aware, RAM erred in calculating the amount of Ms. Coulter's 2002 underage adjustment. We corrected that error in the *Coulter* Decision. It has recently come to light, however, that RAM made a systemic error in calculating 2002 underage adjustments, which affected an unknown number of IFQ accounts that year, including Ms. Coulter's account.[33]
Although RAM corrected an unspecified number of accounts that year as a result of the error, Ms. Coulter's account was not corrected until after we issued the Decision in her case.[34] Both Ms. Buck and Ms. Gharrett stated that 2002 was the only year in which RAM used a different method to calculate underage adjustments.[35] Mr. Rutter submitted no contrary evidence. Thus we find that RAM calculated Mr. Rutter's 2007 underage adjustment in a manner consistent with

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[30]Rutter letter to Judge Moen at 2 (July 10,l 2007).

[31]Hearing tape at 3A/377-391. Mr. Rutter then interrupted Ms. Buck and asked, "Then what is the basis of his adjustment if he got no more pounds added?" This question shows that Mr. Rutter still did not understand that Mr. Roberts got the 2007 underage adjustment solely because he had purchased the block of quota share from Mr. Rutter.

[32]*Mary Ann Coulter,* Appeal No. 02-0010 at 6 (Dec. 29, 2004). An IFQ permit shows the number of pounds a QS holder is authorized to fish for the year. Permits are effective only from the date of issuance until the end of the specified fishing year. 50 C.F.R. §679.4(a)(1)(i)(B). A fishing year, by definition, goes from January 1 through December 31. 50 C.F.R. §679.2 (definition of "fishing year").

[33]Tracy Buck email to Ed Hein (Sep. 5, 2007). Also, Hearing tape at 3A/043-063.

[34]Hearing tape at 3A/158-166.

[35]Ms. Buck wrote: "We determined that this was inconsistent with the way adjustments had been calculated prior to 2002 and was inconsistent with the regulations." Tracy Buck email to Ed Hein (Sep. 5, 2007). Ms. Gharrett testified that she believes 2002 was the only year RAM did it differently. Hearing tape at 3A/188-190.

the way they calculated such adjustments in other years.

The *Coulter* Decision, by the way, may have misled Mr. Rutter to believe that an underage adjustment for the following year can be transferred or retained as part of a QS transfer. In several places in *Coulter* we referred to transferring "underage" or an "underage carryover."[36] That was not quite accurate. The seller can transfer the remaining IFQ pounds in his account, including the current year's adjustment pounds, along with the associated QS units. But an "underage carryover" or an "underage adjustment" for the next year cannot be transferred because it is not calculated, and does not exist, until January 31 of the next year. A person can transfer "adjustment pounds" only after they have been awarded by RAM.

We may also have inadvertently left the impression in *Coulter* that Ms. Coulter received a 2002 underage adjustment only because the seller had transferred the 31 pounds along with the QS units. That is not correct. As Ms. Gharrett testified at the hearing, Ms. Coulter would have received the 31-pound underage adjustment even if she had not bought those pounds from Mr. Sarff.[37] Likewise, in this case, Mr. Roberts received an underage adjustment even though he bought no pounds from Mr. Rutter. Thus, we find no arbitrariness or unexplained inconsistency in RAM's calculation of Mr. Rutter's 2007 underage as compared to RAM's calculation of Ms. Coulter's 2002 underage calculation.

Mr. Rutter also points to changes in wording on the QS/IFQ transfer application in 2005 as further evidence that RAM has been inconsistent and arbitrary in its handling of underage adjustments over the years. The administrative record in this case shows that RAM revised its original 1995 transfer application form in 1998 and again in 2005. The January 16, 1998 version added, among other things, the following sentence to Block F, box 7: "Pounds transferred will include any underage UNLESS OTHERWISE INSTRUCTED." The June 23, 2005 form revised that sentence to its current wording: "Pounds transferred includes [sic] a pro-rata share of any underage based on the QS held or transferred UNLESS OTHERWISE INSTRUCTED."

Ms. Gharrett testified that the 1998 revision of the application was intended to indicate that there is a limit to the amount of pounds that can be transferred with QS units.[38] She stated that adding the language about "pro-rata share of any underage" in the 2005 revision did not reflect any change in RAM's practices regarding transfers.[39] Ms. Gharrett said they wanted clarify in the 2005 version that limit on the amount of IFQ pounds that could be transferred is in proportion to

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[36]Appeal No. 02-0010 at 4 (Dec. 29, 2004).

[37]Hearing tape at 3A/202-208.

[38]Hearing tape at 2A/557-569.

[39]Hearing tape at 2A/570-580.

the number of QS units being transferred.[40]

Mr. Rutter posed the following question to Ms. Gharrett at the hearing: "Are you asserting, Ms. Gharrett, that the system hasn't changed, it's been consistent since the beginning of the program?" She responded:

> Mr. Rutter, I'm asserting that the concept that adjustment must follow the quota share has been in the regulations since the beginning of the IFQ program and the first year of fishing in 1995. And whether the specific language on an application changed or not, we have always followed that requirement of the regulations that adjustments follow quota share.[41]

The record also contains a copy of RAM's pamphlet from 1995 summarizing the IFQ program.[42] In the section labeled "Overages and Underages" RAM states: "The adjustment will be specific for each regulatory area and will affect whomever holds the QS permit the following year."[43] The same section also states: "Any overages or underages affecting your IFQ account will apply to whomever fishes the IFQ permit in subsequent years, whether that is you or someone to whom you have transferred QS or IFQ pounds."[44]

We find by a preponderance of the evidence that Mr. Rutter has not proven that changes in the transfer application form indicate any changes in the way RAM has calculated and awarded underages. We find nothing in the record to indicate that RAM treated Mr. Rutter's QS transfer in 2006 and his underage adjustment in 2007 any differently than it treated other transfer applicants and QS holders.

(4) "Pro-rating adjustments is contrary to the purposes of the underage provision."

Mr. Rutter's final objection is that prorating underage adjustments between sellers and buyers, based on the amount of quota share units they each hold, runs contrary to the underlying purposes of the underage regulation. In this case, Mr. Rutter charges that giving away a share of his underage adjustment forces him to harvest all his fish to the last pound, or else he will lose some of his pounds.[45] At the hearing he stated:

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[40]Hearing tape at 2B/025-051.

[41]Hearing tape at 3A/362-369.

[42]"The IFQ Program: Underway" (February 1995).

[43]*Id.* at 15.

[44]*Id.*

[45]Hearing tape at 3A/460-475.

> To arbitrarily decide that because I had two blocks that it was an incomplete transfer is to deny me the equal protection of the carryover provision. Nobody can hit their poundage to the exact number, and the law allows the latitude to stop within ten percent or to overfish within ten percent. By arbitrarily assigning me an uncompleted transfer, you denied me the right or the privilege to not have to hit the nail on the head. Nobody can look at a pile of fish and say that's so many thousands of pounds of fish.[46]

Mr. Rutter is correct that the underage provision was "designed to address the difficulty of harvesting exactly the amount of fish listed on an IFQ permit."[47] NMFS also stated:

> This underage provision would be added to the IFQ Program to encourage persons not to harvest IFQ species when they are very close to their annual IFQ account limit. Allowing unused IFQ to be placed in the following year's account is intended to provide adequate incentive to encourage this behavior.[48]

These are not the only purposes of the underage provision. Implicit in the second sentence of the 50 C.F.R. §679.40(e) is the purpose of assuring that the benefit of an underage adjustment goes each year to the person who owns the underlying quota share units that generated the underage. That is the meaning of the expression "the adjustment follows the quota share." This is equally true of overages. The final sentence of the overage regulation 50 C.F..R. §679.40(d) provides:

> The adjustment would be a deduction of the amount of IFQ species harvested or landed that was determined to exceed the amount available in the person's annual IFQ account *and will apply to any person to whom the affected IFQ is allocated in the year following the determination.*

As we tried to explain in the Decision in this case, NMFS has a good reason for requiring that both underage adjustments and overage adjustments go to the holder of the quota share. The quota share holder is the person who will have an IFQ account from which an overage can be deducted and to which an underage can be added. NMFS intended that those who overfish and those who underfish be treated equitably.[49] These reciprocal provisions in the underage and overage regulations show that NMFS wants QS buyers to carry both the burden and the benefit of IFQ account adjustments. These provisions have remained unchanged in both regulations

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[46]Hearing tape at 1A/202-217.

[47]Proposed Rule, 57 Fed. Reg. 57,130, 57,136 (Dec. 3, 1992).

[48]Proposed Rule, 60 Fed. Reg. 2,935, 2,936 (Jan. 12, 1995).

[49]"The allowance of adding underages to a following year's IFQ allocation is intended to provide equitable treatment to QS holders who do not harvest their full IFQ by amounts less than 5 percent of their IFQ." Proposed Rule, 57 Fed. Reg. 57,130, 57,136 (Dec. 3, 1992).

since they were first adopted, so it is reasonable to infer that their purpose was intended to coexist with the other purposes of these regulations.

This requirement that adjustment follow the quota share does have a consequence that may seem at odds with the purpose of encouraging QS holders to stay below their annual IFQ limit. Whenever a QS holder sells QS units without the accompanying IFQ pounds, the buyer is somewhat at the mercy of the seller, who controls whether there will be an underage or an overage. Thus, quota share sales contracts commonly provide for compensation to one party or the other as a way of fairly sharing the risk in the event of an overage or underage by the seller.

It is true that Mr. Rutter has been deprived of some of the underage adjustment he would have received if he had not sold the QS units to Mr. Roberts, but he did receive 72 percent of the underage adjustment, which corresponds to the percentage of QS units that he kept. Losing a proportionate share of an underage (or overage) adjustment is a normal consequence of selling QS without also transferring the corresponding QS/IFQ pounds necessary to make it a complete transfer. We find nothing in the outcome of Mr. Rutter's QS transfer or the amount of his 2007 underage adjustment that is contrary to the purposes of the underage regulation.

FINDINGS OF FACT

1. At the beginning of the 2006 season Mr. Rutter held two QS blocks totaling 121,172 QS units.

2. The larger block (87,291 units) constituted 72 percent of his total QS units; the smaller block (33,881 units) constituted 28 percent of his total QS units.

3. RAM apportioned the 1,021 pounds remaining in Mr. Rutter's account between the two QS blocks.

4. RAM attributed 72 percent of those pounds, i.e., 736 pounds, to the larger block, and 28 percent of those pounds, i.e., 285 pounds, to the smaller block.

5. RAM then awarded these pounds as underage adjustments to the holders of the respective QS blocks, as of noon on January 31, 2007.

6. Mr. Rutter cannot fish one block of quota share before the other.

7. RAM need not, and does not, give effect to a fisherman's subjective intent about the order in which pounds were fished.

8. The 1,021 pounds remaining in Mr. Rutter's 2006 IFQ account are actually the remainder from the commingled pool of 23,303 "Fishable IFQ pounds" derived from both QS blocks in 2006.

9. The second preprinted boldface sentence in Block F, box 7, refers to whether or not underage adjustment pounds are to be transferred with QS/IFQ pounds as part of the QS transfer.

10. The sentence in question in box 7 states a presumption RAM will make that in the event QS/IFQ pounds *are* sold with the QS units, a proportionate share of adjustment pounds will be transferred with the QS/IFQ pounds, unless the parties instruct otherwise.

11. The fact that a new permit was issued to Ms. Coulter but not to Mr. Rutter or Mr. Roberts does not show that RAM was inconsistent or arbitrary in calculating Mr. Rutter's 2007 underage adjustment.

12. RAM calculated Mr. Rutter's 2007 underage adjustment in a manner consistent with the way they calculated such adjustments in other years.

13. There is no arbitrariness or unexplained inconsistency in RAM's calculation of Mr. Rutter's 2007 underage as compared to RAM's calculation of Ms. Coulter's 2002 underage calculation.

14. Mr. Rutter has not proven that changes in the transfer application form indicate any changes in the way RAM has calculated and awarded underages.

15. RAM did not treat Mr. Rutter's QS transfer in 2006 and his underage adjustment in 2007 any differently than it treated other transfer applicants and QS holders.

CONCLUSIONS OF LAW

1. Federal regulation 50 C.F.R. §679.40(e) governs who should receive underage adjustments and the amounts of those adjustments.

2. When a person transfers away some of his quota share units, the underage regulation requires RAM to give the buyer a proportionate share of the underage adjustment for the next season.

3. RAM's presumption that both QS blocks contributed proportionately to the 1,021 pounds remaining in Mr. Rutter's account is both reasonable and irrebuttable.

4. A complete transfer requires a QS seller to transfer to the buyer all the QS/IFQ pounds that were generated by those QS units for the current year, or to transfer all the seller's QS units and remaining pounds.

5. Mr. Rutter would have had to transfer at least 6,056 pounds to Mr. Roberts with the QS block in order to have a complete transfer.

6. Mr. Rutter's transfer was incomplete.

7. Mr. Roberts did not have to buy any pounds as part of the QS transfer in order to get a 2007

underage adjustment. He gets it by operation of law because he bought the QS units.

8. The underage provision requires RAM to give Mr. Roberts an underage adjustment because he held the smaller QS block on January 31, 2007.

9. Apportioning the underage adjustment into pro-rata shares based on the relative sizes of the QS blocks is a reasonable and fair method of complying with the underage regulation in this case.

10. The language on the transfer application and in the accompanying instructions are merely advisory and do not have the force of law.

11. Block F, box 7 of the transfer application does not authorize QS sellers and buyers to determine the calculation and awarding of underage adjustments.

12. Implicit in the second sentence of the 50 C.F.R. §679.40(e) is the purpose of assuring that the benefit of an underage adjustment goes each year to the person who owns the underlying quota share units that generated the underage.

13. Nothing in the outcome of Mr. Rutter's QS transfer or the amount of his 2007 underage adjustment is contrary to the purposes of the underage regulation.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision on Reconsideration supplements and incorporates by reference our Decision in this appeal. Both the Decision and the Decision on Reconsideration take effect on November 14, 2007, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. §679.43(o).

Randall J. Moen
Administrative Judge

Edward H. Hein
Chief Administrative Judge