

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 95-0009
)	
JEFF KERBEL,)	DECISION
Appellant)	
_____)	March 14, 1997

STATEMENT OF THE CASE

Appellant Jeff Kerbel filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on January 9, 1995. The IAD denied his application for Quota Share [QS] for Pacific halibut and sablefish under the Individual Fishing Quota [IFQ] program because he had not made legal landings of halibut or sablefish during a QS qualifying year, 1988, 1989, or 1990. Mr. Kerbel's interests are directly and adversely affected by the IAD. Mr. Kerbel's request for a hearing was denied because there are no facts in dispute.¹

ISSUE

Whether a person may qualify for QS on the basis of landings made outside the QS qualifying years of 1988, 1989, or 1990.

BACKGROUND

Mr. Kerbel made landings of sablefish in 1985, and of halibut in 1985 and 1986, before selling his fishing vessel. He then crewed for sablefish in 1987, and crab in 1987 and 1988. He did not fish for halibut or sablefish during 1988 - 1990. He purchased another fishing vessel in August, 1991, and has been fishing halibut and sablefish since then.

Mr. Kerbel claims he purchased his fishing vessel in 1991 because he was confident, after consulting with people at the National Marine Fisheries Service, that he would receive QS under the IFQ program for the landings of halibut and sablefish made from his vessel in 1985 and 1986. He adds that he would have not purchased the vessel if had he known that he would not be given credit for those years, as the loss of the credit caused him to "suffer injury."² He concedes that he is not eligible for QS under the

¹See, 50 C.F.R. § 679.43(g), formerly 50 C.F.R. § 676.25(g).

²See, Mr. Kerbel's December 15, 1994, letter to Phil Smith.

current IFQ program due to his lack of landings during the qualifying years (1988-1990).³ Mr. Kerbel, nonetheless, asks, on the basis of hardship, that his halibut and sablefish landings in 1985 and 1986 be substituted for landings not made during the QS qualifying period. Mr. Kerbel contends that doing so would conform to the intent of the North Pacific Fishery Management Council [Council] to not restrict "those of us who were fishing early on, and making plans for the future because of it."⁴

DISCUSSION

The IFQ regulations base eligibility for QS on landings made during the qualifying years.⁵ The regulations provide for no exceptions to this requirement. The NMFS official record indicates that Mr. Kerbel did not own or lease a vessel from which halibut or sablefish was legally landed during the QS qualifying period, and Mr. Kerbel agrees with the record. Mr. Kerbel asks, nonetheless, that an exception be made on the basis of financial hardship, and that he be considered a qualified person based on his landings in 1985 and 1986.

The Council created the qualifying period, in large part, to prevent those who had left the fishery before 1988 from benefiting from IFQ.⁶ The time chosen by the Council as the qualifying period for the IFQ program may very well have caused Mr. Kerbel hardship and injury. The Council foresaw this possibility in deliberations extending over five years, when it recognized that, under the restructuring of the IFQ program, "(s)ome fishermen will be better off and some will be worse off under the IFQ program."⁷ The Council knew that hardships would be created, and in the face of it, chose not to provide any hardship exceptions. The Council found that the three-year qualifying window for eligibility was "sufficient," and concluded that "no hardship provisions would be considered for this program."⁸

³See, the IAD, at p.1; and the two letters of Mr. Kerbel to Phil Smith, dated June 16, 1994, and December 15, 1994.

⁴See, note 2.

⁵See, 50 C.F.R. § 679.40(a)(2), formerly 50 C.F.R. § 676.20(a)(1); and 50 C.F.R. § 679.40(a)(3)(i), formerly 50 C.F.R. § 676.20(a)(1)(i).

⁶See, 58 Fed. Reg. 59386, November 9, 1993, where the Council excluded years before 1988 from the qualifying period of years, 1988-1990, to avoid allocations to "fishermen who have retired or otherwise left the fishery, and consequently, have not demonstrated sufficient present participation in, and current dependence on, these fisheries."

⁷See, 58 Fed. Reg., 59376 and 59378, November 9, 1993.

⁸See, the Council's newsletter, October 21, 1994, at p. 6. See also, Hardship Cases Under the Halibut and Sablefish IFQ Program, NMFS, September 15, 1994, NPFMC Agenda Item, C-3(b)].

As a matter of law, Mr. Kerbel cannot become a "qualified person" and eligible to receive QS unless a vessel that he owned or leased made legal landings during the qualifying years, or unless he is a successor-in-interest to a person that did. There are no exceptions to this requirement. An Appeals Officer is bound by the duly promulgated regulations of the IFQ program.⁹ Neither this Office nor the Division are empowered to create exceptions to fit individual cases. Therefore, I conclude that Mr. Kerbel is not eligible for QS, and cannot be deemed to be eligible.

FINDING OF FACTS

Mr. Kerbel did not own or lease a vessel that made legal landings of halibut or sablefish during the QS qualifying period, nor is he a successor-in-interest to such a person.

CONCLUSIONS OF LAW

1. An applicant cannot become a "qualified person" and eligible to receive QS unless a vessel that he or she owned or leased made legal landings during the qualifying years, or unless he or she is a successor-in-interest to such a person.
2. Neither this Office nor the Division are empowered to create exceptions to the above rule.
3. Mr. Kerbel is not eligible for QS, and cannot be deemed to be eligible.

DISPOSITION

The IAD denying consideration of 1985 and 1986 as qualifying years is therefore **AFFIRMED**. This Decision takes effect on April 14, 1997, unless by that date the Regional Administrator orders review of the Decision.

Any party, including the Division, may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska Standard Time, on the tenth day after the date of this Decision, March 24, 1997. A Motion for Reconsideration must be in writing, must allege one or more specific 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.

⁹See, George M. Ramos, Decision on Review, April 21, 1995, at p.4, where it states: "it is wholly inappropriate for an administrative appeals officer to pass judgment on either the validity or the wisdom of duly promulgated regulations and policies."

John G. Gissberg
Appeals Officer

I concur in the factual findings of this Decision and I have reviewed this Decision to ensure compliance with applicable laws, and agency policies, and consistency with other appeals Decisions of this Office.

Randall J. Moen
Appeals Officer