NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0054
	)	
STANLEY R. WEIKAL,	)	
Appellant,	)	
	)	DECISION and
	)	
	)	
RALPH & LYNDA COLE,	)	
Respondents	)	September 16, 1996
_____	)	

STATEMENT OF THE CASE

Stanley Weikal and Ralph and Lynda Cole, husband and wife, applied for Quota Share [QS] under the halibut and sablefish Individual Fishing Quota [IFQ] program. Mr. and Mrs. Cole claim as owners of the F/V D. C. COLE. Mr. Weikal claims as lessee of that vessel. At issue are halibut and sablefish landed during the course of seven trips, with the first landing on April 5, 1987, and the last on June 16, 1987.[1] On March 24, 1995, the Restricted Access Management Division [Division] issued an Initial Administrative Determination [IAD] that denied the claims of both parties. Mr. Weikal appealed on May 17, 1995. On June 19, 1995, the Chief Appeals Officer issued an order joining the Coles as parties. Telephonic scheduling and pre-hearing conferences were held on August 2 and October 4, 1995. After due and proper notice, an oral hearing was convened in Seattle, Washington on Friday, October 6, 1995. Mr. Weikal was represented by Mr. James Woeppel, of Aiken, St. Louis, & Siljeg, Attorneys at Law, and Mr. and Mrs. Cole were represented by Mr. Thomas Owens, of Treece, Richdale, Malone, Corning & Abbott, Attorneys at Law.

ISSUE

Did an oral lease exist between Mr. and Mrs. Cole and Mr. Weikal during the period encompassing the seven landings at issue?

BACKGROUND

[1]At the hearing, counsel for Mr. Weikal raised the issue that some of the poundage may have been categorized in the wrong area (e.g. 3A rather than 3B). He was advised that such was best administratively resolved between himself and the RAM Division.

The F/V D.C. COLE, a 58-foot seiner, was purchased by the Coles in 1980 for $525,000. In years prior to 1987 it had been fished by the Coles in the Alaska salmon fishery and in the Puget Sound herring fishery. By late 1986, the herring fishery had sufficiently diminished that the Coles were looking for another use for their vessel in the spring, before they began their customary Alaskan salmon operations. At the time the Alaska halibut and blackcod fishery seemed a viable option, however, the Coles had no experience in longlining for these species.

Mr. Weikal had longlined for both halibut and blackcod on his own 42-foot vessel, the F/V GALE, but sought a larger vessel in order to maximize the profit-making potential, especially by delivering to a particular floating buyer, the Alaskan 1, which was soliciting arrangements with large vessels. Both Mr. Weikal and the Coles resided in Anacortes, Washington and soon made contact through a mutual acquaintance.

At the first meeting between the two, in late 1986, only very general discussions were held. Mr. Cole requested that Mr. Weikal supply a specific proposal. He subsequently did so, summarizing it in a two-page typed document. It listed a sample "scenario" of typical trips and the estimated income from each. It provided that Mr. and Mrs. Cole would receive 30 percent "off the top", and that Mr. Weikal, who would be the only captain, would receive 10 percent "off the top" as well as a crew share. As is customary in the industry, the crew shares were to be based on the net proceeds left after trip expenses, such as fuel, food, and bait, were deducted from the gross proceeds. The Coles were to furnish the halibut gear; Mr. Weikal was to provide his existing blackcod gear.

After a certain degree of negotiating, the parties came to an agreement in December of 1986. I find the terms of the agreement, which generally followed the written proposal,[2] to be as follows:

The Coles were to:

- supply the vessel and fund the conversion to longlining;
- supply the halibut gear;
- provide the insurance for the vessel;
- reimburse Mr. Weikal for funds he expended for materials for the vessel's bait shed prior to departing Anacortes, and for miscellaneous vessel repair parts purchased during the three months he had possession of the vessel;
- pay half the fuel costs for the trip from Anacortes to Sitka.[3]

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[2]The written proposal contained part of the agreement; the remainder was either oral or was determined from the actions of the parties.

[3]The parties agreed that since the Coles would need the vessel in Sitka for their salmon operation in any event, that they would split the cost of the fuel for the trip from Anacortes to Sitka.

Mr. Weikal was to:

- # arrange for the market for the catch;
- # pay the Coles 30 percent "off the top" from each sablefish landing, and 35 percent "off the top" from each Pacific halibut landing;[4]
- # supply all the sablefish gear, including buoys and flags;
- # pay all operating expenses (bait, groceries, fuel, etc.);
- # return all of the Coles' halibut ground line intact; (Each party would retain its own gear at the end of the season.)
- # arrange for topping off the fuel tanks when the vessel was returned to the Coles in Sitka in late June or early July;
- # reimburse the Coles for funds they had expended on his behalf (prior to leaving Anacortes) for the initial stock of groceries, fuel, and sablefish gear refurbishment.

DISCUSSION

Burden of Proof

In Smee v. Echo Belle, Inc.,[5] we stated that because our appeals are *de novo*, the parties to an appeal should begin on an equal footing. To the extent that an appellant has the burden of production, that burden is minimally met by filing an appeal that complies with requirements of the IFQ regulations. In this appeal, although one party is named Appellant and the other is named Respondents, the claims of both parties were denied by the IAD. Either party could have filed as the Appellant, and this office would have joined the other party as Respondent. Therefore, both parties come to this appeal with the same burden of production. As we also stated in Smee,[6] each party to an appeal has the same burden of persuasion that the evidence supports the party's position. Therefore, the Coles are incorrect when they argue that "[t]he burden of proof must lie with a purported lessee until an adverse determination is made." [Coles' Hearing Brief, at 8.]

Analysis of whether Mr. Weikal leased the F/V D.C. COLE

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[4]There is an unresolved dispute as to whether the extra 5 percent was to offset the Coles' insurance costs (as maintained by Mr. Weikal) or was to offset the Coles' expenditures for purchasing the halibut gear (as maintained by the Coles). I find the dispute to be irrelevant..

[5]Appeal No. 95-0076, August 1, 1996, at 5, *aff'd*, August 20, 1996.

[6]*Id.*

Under 50 C.F.R. § 679.40(a)(2),[7] a person who leased a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year, is a "qualified person." Such a vessel lessee will receive QS that would otherwise go to the owner of the vessel.

The regulations do not define "lease," but discuss the evidence that will establish the existence of a lease:

> Conclusive evidence of a vessel lease will include a written vessel lease agreement or a notarized statement from the vessel owner and lease holder attesting to the existence of a vessel lease agreement at any time during the QS qualifying years. Conclusive evidence of a vessel lease must identify the leased vessel and indicate the name of the lease holder and the period of time during which the lease was in effect. *Other evidence, which may not be conclusive, but may tend to support a vessel lease, may also be submitted.*

50 C.F.R. § 679.40(a)(3)(iii)[8] (Emphasis added).

Here, there is no conclusive evidence of a lease, either in the form of a written lease agreement or a notarized statement. Mr. Weikal contends that he has presented sufficient "other evidence" of an oral lease to establish that he was the lessee of the F/V D.C. COLE during the relevant period.

In Smee,[9] we recently readdressed the factors an Appeals Officer should consider in making a case-by-case determination of whether a business relationship will be recognized as a lease when there is no written lease document. In Smee, we considered the factors developed in O'Rourke v. Riddle[10] and Kristovich v. Dell,[11] and expressly added as a separate factor: "how the parties characterized their business arrangement at the relevant times." That factor was renumbered as the first factor to consider. I will accordingly consider the following noninclusive factors[12] in order to determine whether the unwritten arrangement between the parties was a lease:

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[7]Formerly 50 C.F.R. § 676.20(a)(1). Effective July 1, 1996, 50 C.F.R. Part 676 was removed and the regulations thereunder were renumbered. However, there have not been any changes material to the issues in this appeal.

[8]Formerly 50 C.F.R. § 676.20(a)(1)(iii).

[9]Appeal No. 95-0076, August 1, 1996, at 5-7, *aff'd*, August 20, 1996.

[10]Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995.

[11]Appeal No. 95-0020, March 20, 1996, at 10, *aff'd* March 27, 1996.

[12]"[T]hese are not exclusive factors. Appeals Officers have discretion to consider other factors that, in their judgment, help in determining whether a lease existed between the parties." Smee, at 7.

(1) how the parties characterized their business arrangement at the relevant times.

(2) whether and to what extent the claimed lessee had possession and command of the vessel and control of navigation of the vessel;

(3) whether the claimed lessee directed fishing operations of the vessel;

(4) whether the claimed lessee had the right to hire, fire, and pay the crew;

(5) whether the claimed lessee was responsible for the operating expenses of the vessel;

(6) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her own business for federal income tax and other purposes; and

(7) whether the claimed lease had a set or guaranteed term.

1. The parties' characterization of the arrangement

The written proposal prepared by Mr. Weikal in late 1986 did not mention a lease or charter of the F/V D.C. COLE. One might have expected him to specifically propose a charter or lease if that is what he had in mind. In addition, Mr. Weikal wrote that "I would agree to skipper the boat for the entire season" and "I would want to be the only skipper." This language could reasonably be interpreted as an offer to be a hired skipper, rather than a lessee. On the other hand, the language might merely have been an expression of intent that Mr. Weikal, rather than someone else (specifically Mr. Cole), would operate the vessel. Because this language was only the opening proposal and because its intent is somewhat ambiguous, I do not give the proposal much weight in determining whether the parties had a lease in mind at that stage of the negotiations.

Although the issue was disputed, I find as fact that in the oral discussions the parties came to no agreement one way or another as to whether their arrangement constituted any particular kind of business or employment arrangement. It appears that the parties, at that time, perceived no particular need to apply a label to the relationship. Specifically, I find that there was no overt agreement that it was to be a lease.

As far as contemporaneous representations are concerned, in his federal tax return for 1987, Mr. Weikal listed his payments for use of the vessel as "Lease D.C. Cole."

In his RFA, Mr. Weikal stated that he had leased the F/V D.C. COLE from March 1987 until July 1987, and he has consistently maintained this position.

The Coles' characterization of their business relationships, however, has not been consistent and contains several anomalies. On their first RFA, submitted by mail and received by the Division on July 5, 1994, the Coles stated that they had leased the F/V D.C. COLE to:

(1) Mr. Weikal from March 15, 1987, until June 25, 1987;
(2) Terry MacDonald from April 1, 1988, until October 20, 1989;
(3) Francis John Richmond from January 28, 1991, until June 28, 1991; and
(4) to Donald Duane Whitney during unspecified dates in 1991 and 1992.

With their first RFA, the Coles submitted two notarized statements attesting to oral partnership agreements: one between Mr. MacDonald and Mr. Cole for the halibut and sablefish openings of 1988 and 1989; the other between Mr. Richmond and Mr. Cole for the halibut and sablefish openings of 1990 and 1991. Both statements recite that the F/V D.C. COLE is owned by Mr. Cole; neither statement mentions any lease of the vessel.

On July 7, 1994, the Coles visited the offices of the Division in Juneau and discussed the matter of their RFA with Jessica Gharrett of the Division. The Coles then submitted a revised RFA in which they state that they did not lease the F/V D.C. COLE for purposes of fixed-gear commercial fishing during 1984-1991. A notation about this conversation on a copy of the revised RFA by Ms. Gharrett states: "I thoroughly explained the concept of a vessel lease to Mr. and Mrs. Cole. They signed this form after consciously indicating the vessel was not leased."

In a July 14, 1994, letter to the Coles' attorney, John Sinclair, Ms. Gharrett states [at page 2]:

> Lynda [Cole] stated she had inappropriately listed other vessel operators as leaseholders [on the July 5 RFA]. Mr. Cole also confirmed that he did not lease the vessel to anyone. . . .
>
> . . . I concluded the following:
> . . . (2) the Coles do not consider that they leased the D C Cole to anyone at any time it was under their ownership.

On appeal, however, the Coles state that they entered into a vessel lease with Terry MacDonald as an individual in 1988. In support of that assertion, the Coles submitted a written "Vessel Lease Agreement for Long Line Black Cod and Halibut" between Ralph Cole, as owner of the F/V D.C. COLE, and Terry MacDonald, as skipper of the vessel. The agreement does not state any period of time in which it was to be in effect, and it is not signed or dated by the parties. Along with this unexecuted agreement, the Coles submitted an affidavit from Terry MacDonald, Sr., dated September 22, 1995. In the affidavit, Mr. MacDonald states that he executed the lease agreement and that it was in full force

and effect in 1988.[13] The Coles maintain that this written lease, when contrasted with their oral agreement with Mr. Weikal, shows that Mr. Weikal did not hold a lease of the vessel.

I find it difficult to make sense of the conflicting statements the Coles have made regarding whether and to whom they leased the F/V D.C. COLE. Their first RFA acknowledged the existence of leases with Mr. Weikal and others, but this is contradicted by their simultaneous submission of memoranda of partnerships with MacDonald and Richmond. The Coles' revised RFA, which retracts their original statement about the existence of vessel leases, is contradicted by their subsequent submission on appeal of a supposed written lease agreement between Mr. Cole and Mr. MacDonald. Even granting that at the time the Coles submitted their first RFA they may have had a layperson's understanding of what constitutes a vessel lease (which is ultimately a legal question), their initial response indicates that they believed they had leased their vessel to Mr. Weikal and others. I presume that they would never have acknowledged the existence of multiple leases if they had held a strong conviction that they had never leased the vessel to anyone. Given the Coles' contradictory statements regarding leases, I am inclined to give more credence to their initial acknowledgment, which they appear to have made before becoming aware of the effect it would have on the amount of QS that would be issued to them.

2. Possession and command of the vessel and control of the navigation

During the course of the approximately three and one-half months that Mr. Weikal operated the vessel, he had only two communications with the Coles. One was a telephone call Mr. Weikal made when his crew quit; the other was when his wife told him that the Coles wanted him to call them about returning the vessel to Sitka. Although the date of the second communication is not certain, it appears to have occurred after the seventh trip [the"hole" trip], for which the landing was made on June 16, 1987. The date the vessel was delivered to Sitka is likewise unclear. However, because many of the final halibut and sablefish crew checks were drawn on June 29, 1987, and because the summer salmon records for the F/V D.C. COLE began on July 1, 1987, I will assume, for the purposes of this decision, that the vessel was returned to the Coles on July 1, 1987. The weight of the evidence indicates that Mr. Weikal had exclusive possession and control of the vessel and control of its navigation during the entire three-month period in question, and I so find.

3. Direction of the fishing operations

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[13]The records of the Division show that Mr. MacDonald, Mr. Richmond, and the Coles all received QS on the basis of their interests in their dissolved partnerships. Under the applicable IFQ regulations, the F/V D.C. COLE must have been owned by, or leased to, the partnerships in order for the former partners to share the credit for the vessel's landings.

The vessel sailed from Anacortes in mid-March of 1987.[14] In accordance with the agreement, Mr. Weikal chose where and when to fish, selected the various markets for the product landings (mainly Alaska Fisheries Company, but also Trident and Dragnet Fisheries), made arrangements for the Coles' 30 percent or 35 percent share to be paid to them by the fish buyer, made arrangements for and paid for fuel, bait, and groceries, and paid the crew. There is no evidence in the record that the Coles played any role whatsoever in directing the fishing operations. Therefore, I find that this factor weighs in favor of Mr. Weikal.

4. The right to hire, fire, and pay the crew

The written proposal was silent regarding crew. Several crewmembers who had previously fished with Mr. Cole were in Anacortes in early 1987, and in need of work. Mr. Weikal needed a crew. He hired several of them. One of the crew was Joe Cole, the son of the Coles. He sailed as an ordinary crew member and had no management authority. In mid-May, after the fourth landing, Mr. Weikal's entire crew quit. Especially as one was Mr. Cole's son, Mr. Weikal felt it was necessary to explain to Mr. Cole his view of the circumstances and his need to hire a new crew. It is an open question whether Mr. Cole "gave permission" for the crew replacement, or was merely informed of the circumstances. In any event, as the Coles were a thousand miles away, Mr. Weikal had little choice but to hire a new crew. Over the course of the next several weeks, he was engaged in considerable hiring and firing until he had a passable crew. I find that Mr. Weikal had the right to hire, fire, and pay the crew.

5. Responsibility for operating expenses of the vessel

As with other factors, a flexible approach is needed when considering responsibility for operational expenses. Because of the great variety in commercial fishing business arrangements and in the way expenses and risks of fishing operations are allocated between the parties, no single expense or category of expenses is likely to determine whether the parties had a lease agreement or not. Whether or not they represent a capital investment in the vessel, operating expenses should be considered only to the extent that they shed light on the question of whether a vessel lease existed. The question is not which party invested more money in the fishing operations; rather, it is whether the payments, responsibilities, risks, and method of operation -- as evidenced by the handling of expenses -- were more consistent with a lease than some other arrangement, and whether they, therefore, tend to show that there was a lease. "Operating expenses of the vessel" are those expenses that are attributable to, and necessitated by, the fishing operations in question. Smee, at 12-14.

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[14]The precise date is unknown. Both parties seem to be in agreement that it was in mid-March. As the first landing was not made until April, it does not appear that it is essential that the precise date of sailing be established.

a. Insurance

The written proposal was silent regarding insurance. Mr. Cole purchased hull and P&I coverage for the longline operations, which carried a premium of approximately $8,000. In the course of obtaining the insurance, Mr. Cole had written his insurance agent in December of 1986 and listed five crewmembers who would be accompanying Mr. Weikal. Although Mr. Cole maintains that the insurance might not have been issued but for the presence of his named prior crew on board, only two of those named actually fished the halibut and sablefish fisheries.[15] Further, the documentation indicates that insurance coverage existed for only six persons, and then only beginning May 1, 1987. Although the vessel sailed from Anacortes with six on board, that was because one person initially hired by Mr. Weikal had decided to take other employment. Mr. Weikal accordingly had made arrangements to pick up another crew member in Kodiak.[16] Finally, the insurance presumably remained in effect (though arguably for six on board instead of seven) even though Mr. Weikal later hired an entirely new crew.

b. Conversion and outfitting costs

Since the vessel had never previously been used for longlining, extensive modifications were necessary. These included construction of a bait shack, rollers, a deck steering station, and so forth. Pursuant to the agreement, the Coles bore the cost of such. Mr. Weikal worked with the Coles and the crew on these projects in Anacortes before leaving for Alaska. He made some purchases on behalf of the Coles (e.g. $940 for bait shack materials) and they made some pre- sailing purchases (e.g. $3,000 for crew groceries and $1120 for sablefish gear refurbishment supplies) on his behalf. The vessel's fuel tanks were filled by the Coles before the vessel left Anacortes. The Coles were reimbursed for the initial fuel and grocery costs when the first landing was made. They were reimbursed for the sablefish gear supplies in the end of season settlement.

c. Licenses

Mr. Weikal purchased the various licenses from the Alaska Commercial Fisheries Entry Commission [CFEC] for sablefish, halibut and miscellaneous finfish at a cost of $600. He was required to have these licenses whether he was a hired skipper or a lessee. Mr. Cole, as vessel owner, applied for a license from the International Pacific Halibut Commission. There is no charge for this license. The Alaska vessel license was purchased for $20 by Mr. Weikal, but he was reimbursed by Mr. Cole. Mr.

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[15]Only one named in the letter crewed for the Coles during the 1987 salmon season. Two of the additional four hired by Mr. Weikal presumably had some connection with the Coles as they served as crew during the 1987 summer salmon fishery.

[16]The parties had never discussed insurance one way or the other. The Coles were not aware that Mr. Weikal was going to pick up another crew member in Kodiak and therefore arranged P & I coverage (at least as of May 1, 1987) for only six persons. Such might have had major ramifications on their P & I insurance coverage.

Cole advanced the crew a total of $210 for their individual licenses. Mr. Weikal withheld the respective license amounts from each crewmember's settlement and reimbursed the Coles in the end-of-season settlement.

d. Relative costs of gear

Mr. Weikal estimated the value of the fishing gear he supplied at approximately $7,000 to $10,000. This included gear he had left over from the previous season, gear he purchased in late 1986 and early 1987, and gear ($1045) purchased for him by the Coles, for which he reimbursed them at the end of the 1987 season. The value of the halibut gear and sablefish bait cutter supplied by the Coles was approximately $7,000.

e. Credit

Upon settling on the agreement, Mr. Weikal met in Seattle with his market, Alaskan Fisheries Company, and made arrangements for costs to be charged to his account. As previously noted, some of the pre-sailing purchases were made on the Coles' accounts and some on Mr. Weikal's accounts.

f. Expenses and income from fishing operations

Many of the invoices bore the name of the F/V D.C. COLE. Others, however, were issued in Mr. Weikal's own name and/or in the name of his own boat, the F/V GALE. Although Mr. Weikal was responsible for all moorage costs, one moorage bill from Kodiak for $15 was ultimately sent to the Coles. They did not forward it to Mr. Weikal, and apparently paid it themselves.

The vessel made seven trips. During the first six, the total gross landings were approximately $188,000, and the Coles' share was approximately $60,000. There was a mechanical failure on the seventh trip. The total value of fish landed was $2,611. The Coles received their 30 percent "off-the-top" share of $783, leaving $1,828 for Mr. Weikal's percentage share, the various crew shares, and the trip expenses. Unfortunately, the trip expenses amounted to $2,152. This resulted in a shortage of $324. Although in theory the crew is supposed to help pay for a "hole" trip, as a practical matter Mr. Weikal took personal responsibility for the expenses. Although he was not obligated to do so, he also paid two of the crew members $100 each when they departed the vessel.

At the end of the season, Mr. Weikal was billed for $2,719.11 from Alaskan Fisheries, the owner of the ALASKAN 1, his principal buyer and supplier. It apparently represented the aggregate amount Mr. Weikal still owed from his purchases. It is not clear whether these amounts were ever factored in to the prior crew settlements. In any event, Mr. Weikal paid this bill out of his own funds.[17]

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[17]Of interest is the fact that the bill itself is made out to Ralph Cole and lists his Anacortes address. However, Mr. Weikal recollects that the bill was mailed direct to him and the Coles do not aver it was mailed to them first.

As stated earlier, determining which party had responsibility for the operating expenses of the vessel is not a matter of counting up how much each party invested in the operation and deciding in favor of the party who invested more money. The question is whether the evidence regarding how expenses were handled tends to show that there was a lease. In this case, both parties made substantial investments in the fishing operations. Both parties provided several thousands of dollars worth of gear. Mr. Weikal personally bore the loss of the "hole" trip, paid for trip expenses out of personal funds, and paid the Coles a 5 percent fee in addition to their 30 percent "off-the-top" share. The Coles, on the other hand, paid to convert the vessel for longlining, advanced funds for the initial stock of groceries, reimbursed Mr. Weikal for some vessel parts he had purchased, and were responsible for the insurance. The relative equality in the division of responsibilities between the parties for operating expenses is not inconsistent with the existence of a lease, but it also is not determinative of the issue. Thus, in this case, other factors will carry a greater weight in determining whether Mr. Weikal held a vessel lease.

6. Treatment of the fishing operations for tax and other purposes

Mrs. Cole had initially anticipated that she would be doing the bookkeeping and paying suppliers and the crew. As a consequence of this, she gave draws to two of the crew members in December of 1986. However, none of this was communicated to Mr. Weikal. Once the vessel left Anacortes, Mr. Weikal also gave draws to the crew and undertook to perform the bookkeeping and pay suppliers and crew. The Coles, realizing it was more practical for Mr. Weikal to do so, acquiesced.[18] Mr. Weikal subsequently issued 1099s to the crew in his own name and with his own employer identification number for their earnings during the halibut and sablefish operations. On schedule C of his Federal tax return he listed the $61,000 he had paid to the Coles as "Lease D.C. Cole."

Mrs. Cole issued 1099s to the crewmembers that worked later that year in the salmon operation. She also paid unemployment taxes to the state of Washington on the crew's salmon earnings,[19] but did not do so for crew wages earned in the halibut and sablefish operations. Although Mr. Weikal did not pay Washington unemployment taxes either, the fact that the Coles paid them in one instance but not in another suggests that they viewed their relationship with the crewmembers for salmon fishing differently than they did for sablefish and halibut fishing.

On balance, I find that the parties' treatment of the fishing operations in question was slightly more

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[18]The Coles were reimbursed for those advances out of the crewmembers' summer 1987 salmon earnings.

[19]Under Washington law, unemployment taxes are payable irrespective of where the vessel fished if the employer maintained in Washington an office from which the operation of the vessel was ". . . ordinarily and regularly supervised, managed, directed and controlled." See RCW 50.04.170.

consistent with the existence of a lease by Mr. Weikal than with some other business relationship between the parties.

7. Whether claimed lease had a set or guaranteed term

The agreement was to terminate when the Coles needed the vessel for their customary Alaskan salmon seining operations. The parties anticipated that this would occur sometime in early July. Since the precise date of the salmon opening was not known at the time the parties entered into the agreement, they agreed that the use of the vessel by Mr. Weikal would end at an indeterminate time in late June or early July, the exact date being contingent upon instructions from Mr. Cole that Mr. Weikal was to take the vessel to Sitka. As stated earlier, I assume that the vessel was returned to the Coles on July 1, 1987. I find the period of the agreement sufficiently definite to constitute a set or guaranteed term.

Summary of the evidence

In reviewing and weighing all the evidence in this case, and applying the factors for claimed oral leases, I find that the preponderance of the evidence favors Mr. Weikal's claim that he held a vessel lease from the Coles. I reach this result on the basis of several things: (1) Mr. Weikal made substantial investments in the fishing operations in question, and had substantial responsibility for the operating expenses of the vessel; (2) Mr. Weikal had full control and direction of the vessel and the fishing operations during the period of time in question; (3) Mr. Weikal arranged for the market for the fish and controlled the disposition of the catch; (4) once an agreement was reached between the parties, Mr. Weikal's treatment of the fishing operations and all related matters was entirely consistent with the existence of a lease; (5) the Coles' RFA initially acknowledged the existence of a vessel lease with Mr. Weikal; (6) the Coles' treated the crewmembers in the halibut and sablefish fisheries differently than they treated crew in the salmon fishery, for Washington State unemployment tax purposes; and (7) the agreement had a set term.

FINDINGS OF FACT

1. Mr. Weikal entered into an oral lease of the F/V D. C. COLE with the co-owner of the vessel, Mr. Cole, in December of 1986.

2. The lease period was from March 15, 1987, until an initially indeterminate date in late June or early July of 1987, depending on precisely when the owner needed the vessel for his salmon operations. The termination date was subsequently set by agreement as July 1, 1987.

CONCLUSIONS OF LAW

1. The oral lease agreement between the parties constitutes a vessel lease for purposes of the Pacific halibut and sablefish IFQ program.

2. Qualifying pounds resulting from legal landings of halibut and sablefish made from the F/V D.C. COLE during the period March 15, 1987, through June 30, 1987, should be allocated to Mr. Weikal, based on his lease of the vessel from the Coles during that period.

DISPOSITION AND ORDER

The Division's initial administrative determination, dated March 24, 1995, withholding qualifying pounds to either party is VACATED. Stanley R. Weikal is deemed to have leased the F/V D. C. COLE from March 15, 1987, through June 30, 1987. The RAM Division is ORDERED to allocate qualifying pounds derived from landings from the vessel during that time period to Stanley R. Weikal and to issue the resultant Quota Shares and IFQ permits to him. This decision takes effect on October 16, 1996, unless by that date the Regional Administrator[20] orders review of the decision. Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 10 days after the date of this decision, September 26, 1996.

James Cufley
Appeals Officer

I concur in the factual findings of this decision and I have reviewed this decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

Because the prevailing party in this appeal still has an opportunity to receive QS and the corresponding IFQ for the 1996 fishing season, I recommend that the Regional Administrator expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

[20]The title of Regional Director was changed to Regional Administrator as a result of a NMFS administrative reorganization, effective August 22, 1996.

Edward H. Hein
Chief Appeals Officer