

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0068
	)	
HARRY A. NOLAND,	)	DECISION
Appellant	)	
_____	)	December 15, 1997

STATEMENT OF THE CASE

Appellant Harry A. Noland filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program<sup>1</sup> [RAM] on March 20, 1995. The IAD denied Mr. Noland's application for Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish because he failed to show he qualified for QS. On appeal, Mr. Noland claims for the first time that he owned the F/V MISTRESS in 1988 and that he should receive IFQ credit for the landings made from the vessel that year.

Mr. Noland requested a hearing, but because the record contains sufficient information on which to reach a final decision, and because there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered.<sup>2</sup>

ISSUES

1. Whether this Office may consider Mr. Noland's claim of vessel ownership made for the first time on appeal.
2. Whether Mr. Noland owned the F/V MISTRESS in 1988.

BACKGROUND

On July 18, 1994, Mr. Noland filed a timely Request for Application for QS [RFA].<sup>3</sup> On his RFA

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<sup>1</sup>The Restricted Access Management Division was renamed Restricted Access Management Program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

<sup>2</sup>50 C.F.R. § 679.43(g)(2)-(3); formerly 50 C.F.R. § 676.25(g)(2)-(3). All IFQ regulations were renumbered, effective July 1, 1996. *See* 61 Fed. Reg. 31,270 (1996). The wording of the regulation in question was unchanged by the renumbering.

<sup>3</sup>The filing deadline was July 15, 1994, but RAM accepted as timely any RFA postmarked by that date. Mr. Noland's RFA was postmarked July 15, 1994.

(Form A), Mr. Noland indicated that he was applying for halibut and sablefish QS. He did not supply any information regarding vessels that he had owned or leased, or landings of halibut or sablefish that were made from his vessels. In response, RAM sent an Application for QS to Mr. Noland, which he ultimately received in September 1994. Although a copy of Mr. Noland's application is not in the record, the practice of RAM was to display on the application, among other things, an applicant's vessel ownership information that was contained in the NMFS Official Record.<sup>4</sup>

The record also shows that a Quota Share Data Summary [QSDS] was mailed to Mr. Noland in October 1994, which he also received. The vessel information shown on a QSDS is also derived from the NMFS Official Record, and would normally be the same information that RAM displayed on the application, unless RAM had made changes to the Official Record between mailings. There is no evidence in the record that any changes were made to the Official Record concerning Mr. Noland. Thus, it can be presumed that the same vessel information appeared on both the application and the QSDS.

The QSDS shows that Mr. Noland owned two vessels, the F/V ESTHER J and the F/V BONANZA. The QSDS also indicates that Mr. Noland was not eligible for halibut QS or sablefish QS. The NMFS Official Record does not show that Mr. Noland owned any other vessels during the years 1984 - 1991.

Along with application forms, RAM routinely sent applicants instructions that advised them, among other things, to correct any mistakes or omissions they might find in the application.<sup>5</sup> Likewise, along with the QSDS, RAM notified applicants that they had 90 days to contest any of the information in the summary.<sup>6</sup> Mr. Noland did not respond to the application or the QSDS and did not notify RAM of any errors in those documents. Approximately two months after Mr. Noland's 90-day response deadline,

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<sup>4</sup>The NMFS Official Record is a database created by RAM, the information in which was derived from a larger database known as the NMFS/RAM Official Database. See, Charles A. Adamonis, Appeal No. 95-0133 (Reconsideration), February 7, 1997, at 2, n.2. The term "the record" used in this Decision refers to the entire Administrative Record of this appeal.

<sup>5</sup>Regarding vessel information on the QSDS, RAM advised: "If it is in error, you need to provide corrections. . . . Please correct the identifying information on the form . . . by crossing out the mistakes and writing in the correct information. If the form incorrectly identifies your interest in the vessel(s), or if it does not show all of the vessels in which you had an interest during the QS base years, attach additional information describing exactly what your interest was and why it was different from the information you submitted on your Request for Application." [Application Information, at 11]

<sup>6</sup>The time limit was based on 50 C.F.R. § 679.40(a)(7) [formerly, 50 C.F.R. § 676.20(d)(1)], which provides, in part: "The applicant will have 90 days to submit corroborating documents . . . in support of his/her application or to resubmit a revised application."

RAM issued an IAD denying his application for QS on the grounds that “there is no evidence that you, in fact, owned or leased a vessel upon which qualifying landings were made.” [IAD, at 2]

On appeal, Mr. Noland claims for the first time that he owned the F/V MISTRESS in 1988 and that legal landings of halibut and sablefish were made from the vessel that year. In support of his claim, Mr. Noland submitted a copy of a Bill of Sale on a U.S. Coast Guard form, which shows that he purchased the vessel and became its sole owner on December 18, 1987. A U.S. Coast Guard abstract of title for the F/V MISTRESS, obtained by this Office, shows that Mr. Noland was the sole owner of the vessel from December 18, 1987, until January 24, 1989. [Exhibit 3] The NMFS Official Record shows that legal landings of halibut and sablefish were made from the F/V MISTRESS in 1988, but does not list any owner of the vessel for 1988.

## DISCUSSION

### **1. Whether this Office may consider Mr. Noland’s claim of vessel ownership made for the first time on appeal.**

To qualify for QS under the IFQ regulations, a person must have owned or leased a commercial fishing vessel at the same time that legal landings of halibut or sablefish were made from the vessel during the QS qualifying years: 1988, 1989, or 1990.<sup>7</sup> Until he filed his appeal, Mr. Noland did not specifically claim ownership or a lease of any vessels. Because the NMFS Official Record did not show that Mr. Noland owned or leased any vessels that made qualifying landings, his application was denied.

In Tiger, Inc., we stated that applicants who do not raise a claim contrary to the NMFS Official Record on the RFA or application, or in some other manner before the 90-day deadline for substantiating claims, do not have a timely claim for which relief can be granted on appeal. We also stated that we would not consider an appeal based on a claim that was never presented to RAM.<sup>8</sup> Because Mr. Noland did not make a timely claim with respect to his ownership of the F/V MISTRESS, we normally would not consider his claim on appeal. The circumstances of this case, however, necessitate that we create an exception to the timely claim rule and that we consider Mr. Noland’s claim for the first time on appeal.

IFQ Regulation 50 C.F.R. § 679.40(a)(6)(i) [formerly, 50 C.F.R. § 676.20(d)] provides, in part:

The application form sent to the person requesting a QS allocation will include all data

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<sup>7</sup>50 C.F.R. § 679.40(a)(2).

<sup>8</sup>Tiger, Inc., Appeal No. 95-0100 (Decision on Reconsideration), February 26, 1996, at 7.

on that person's vessel ownership and catch history of halibut and sablefish that can be released to the applicant under current state and Federal confidentiality rules, and that are available to the Regional Director [Administrator] at the time of the request.

RAM interprets the regulation to mean that it is required to provide on an application form only the data contained in the NMFS Official Record. This interpretation is inconsistent with the clear requirement of the regulation that all data on an applicant's vessel ownership *that are available to the Regional Administrator* at the time an application was requested must be included on the application form.<sup>9</sup>

In the present case, Mr. Noland requested an application on July 15, 1994. At that time, RAM had in its possession data showing that Mr. Noland owned the F/V MISTRESS in 1988. The State of Alaska's Commercial Fisheries Entry Commission [CFEC], on or about October 4, 1993, provided to RAM a computer disk containing data from CFEC vessel registration and permit records.<sup>10</sup> [Exhibit 1] The data shows that a vessel registration fee for the F/V MISTRESS was paid November 5, 1986; that the two-year registration was valid until December 31, 1988; and that Mr. Noland owned the vessel at the end of 1988.<sup>11</sup> This data is still in RAM's possession in its original form.

In creating the NMFS Official Record, however, this data was omitted. Contrary to the CFEC data, the NMFS Official Record indicates that the vessel registration for the F/V MISTRESS that was paid November 5, 1986, was valid for only one year and expired on December 31, 1987. The NMFS Official Record lists no registered owner in 1988 and does not show that Mr. Noland ever owned the vessel. RAM's failure to include on Mr. Noland's application form the data showing his 1988 ownership of the F/V MISTRESS violated the requirements of 50 C.F.R. § 679.40(a)(6)(i) because the data was *available to the Regional Administrator* — indeed, was in RAM's possession — at the time Mr. Noland requested an application.

If RAM had properly included Mr. Noland's complete vessel ownership information in the NMFS Official Record, that information would have appeared on his application and on the QSDS that was

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<sup>9</sup>In light of RAM's creation and use of the NMFS Official Record, we read the regulation to require RAM to include the information in the Official Record, as well as on application forms and QSDS's.

<sup>10</sup>According to CFEC computer specialist Don Huntsman, who prepared and provided this data to RAM, the disk was sent to RAM between October 1, 1993, the date of the disk, and October 5, 1993, the date the project was "closed out." He said the most probable date was October 4. [Telephone conversation between Chief Appeal Officer Edward H. Hein and Don Huntsman, December 9, 1997]

<sup>11</sup>The CFEC data lists Mr. Noland's ID number just before the vessel name. This ID number was an encryption of Mr. Noland's Social Security Number and was adopted by RAM as his IFQ ID number.

sent to him. If the information had been in the NMFS Official Record, RAM would have issued to Mr. Noland any QS for which he was qualified as a result of his ownership of the F/V MISTRESS, even though he did not respond to those mailings, and even though his RFA did not contain a specific claim regarding vessel ownership.<sup>12</sup>

RAM acknowledges that the NMFS Official Record contained errors.<sup>13</sup> Understandably, it may have been impossible, or at least impractical, for RAM to identify and correct all the errors. Perhaps for this reason, RAM shifted the burden of finding and correcting errors to the applicants. In many, perhaps most instances, this burden-shifting may have been a practical necessity. For example, RAM had no independent source of information about vessel leases; it had to rely on applicants [either lessees or lessors] to inform the agency of the existence of any leases. Lease information was not *available to the Regional Administrator* without the assistance of the parties involved in the leases. But where, as in this case, RAM already had in its possession the correct vessel ownership information and, in the process of creating its NMFS Official Record RAM injected the error, it is unreasonable to hold the applicant responsible for finding and correcting the error.

Under these circumstances, shifting the burden to applicants cannot serve to relieve RAM of its duty under the regulation to provide the vessel ownership data on the application forms. RAM has a duty to correct the error in its Official Record even though the applicant failed to do so within the period of time required by the agency. Where NMFS has failed to meet its regulatory duty in a manner that prejudices an applicant's interest in QS, we must conclude that, as a matter of law, the applicant's claim was timely made when it was raised for the first time on appeal to this Office. Thus, we conclude that it is proper for us to consider on appeal Mr. Noland's claim to have owned the F/V MISTRESS in 1988.

## **2. Whether Mr. Noland owned the F/V MISTRESS in 1988.**

To qualify for an initial issuance of QS under the IFQ program, an applicant must first establish that he

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<sup>12</sup>RAM advised applicants that "We have construed your signed, dated, and timely-submitted Request for Application to be the equivalent of a formal application for any and all Quota Share for which you may be qualified. Therefore, even if you have not yet returned the 3-Part Application, we consider your application to be timely-filed, and any QS for which you are determined to be eligible will be issued to you at the same time it is issued to everyone else." [Explanations and Instructions accompanying the QSDS, at 4]

<sup>13</sup>"The Official Record was derived from the best information available to NMFS, including the vessel registration file provided by the CFEC. It was not a perfect record. Historic mistakes in programming, in data entry, and in data maintenance caused the data sets used by NMFS to construct the Official Record to be imperfect." [Philip J. Smith memorandum to Ed Hein, April 25, 1996, at 3. Exhibit 2]

or she is a "qualified person" by virtue of having owned or leased a vessel that made legal landings of halibut or sablefish with fixed gear during a QS qualifying year, 1988-1990.<sup>14</sup> As the program has been implemented by RAM, a qualified person may receive credit only for landings that were made from a vessel owned or leased by the applicant at the time of the landings. Evidence of vessel ownership is limited to three types of documents, in order of priority: a U.S. Coast Guard abstract of title, a certificate of registration that is determinative of vessel ownership, and a bill of sale.<sup>15</sup> The best evidence of vessel ownership, if it exists, is a Coast Guard abstract of title. Absent any evidence that an abstract of title is erroneous or fraudulent, NMFS is required to accept that document as proof of ownership.<sup>16</sup>

The U.S. Coast Guard abstract of title for the F/V MISTRESS shows that Mr. Noland was the sole owner of the vessel from December 18, 1987, until January 24, 1989. [Exhibit 3] There is no evidence in the record that the abstract of title is erroneous or fraudulent. Therefore, we find by a preponderance of the evidence that Mr. Noland owned the F/V MISTRESS from December 18, 1987, until January 24, 1989.

#### FINDINGS OF FACT

1. On July 15, 1994, when Mr. Noland requested an application, RAM had in its possession data showing that he owned the F/V MISTRESS in 1988.
2. When RAM created the NMFS Official Record, data showing Mr. Noland's ownership of the F/V MISTRESS were omitted.
3. Mr. Noland owned the F/V MISTRESS from December 18, 1987, until January 24, 1989.

#### CONCLUSIONS OF LAW

1. RAM's interpretation of 50 C.F.R. § 679.40(a)(6)(i), that it is required to provide on an application form only the data contained in the NMFS Official Record, is inconsistent with the clear requirement of the regulation that all data on an applicant's vessel ownership that are available to the Regional Administrator at the time an application was requested must be included on the application form.

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<sup>14</sup>See 50 C.F.R. § 679.40(a)(2) and (3)(i). An applicant who is a successor-in-interest to a qualified person may also receive an initial issuance of QS.

<sup>15</sup>See 50 C.F.R. § 679.40(a)(3)(ii).

<sup>16</sup>Weber v. Kochuten, Appeal No. 95-0122, June 18, 1996, at 3.

2. RAM's failure to include on Mr. Noland's application form the data showing his 1988 ownership of the F/V MISTRESS violated the requirements of 50 C.F.R. § 679.40(a)(6)(i).
3. Mr. Noland's claim of ownership of the F/V MISTRESS was, as a matter of law, timely made when it was raised for the first time on appeal.
4. It is proper for this Office to consider on appeal Mr. Noland's claim to have owned the F/V MISTRESS in 1988.

#### DISPOSITION AND ORDER

RAM's Initial Administrative Determination of March 20, 1995, which denied Mr. Noland's application for QS, is VACATED. RAM is ORDERED to (1) amend the NMFS Official Record to reflect that Mr. Noland owned the F/V MISTRESS from December 18, 1987, until January 24, 1989; (2) allocate to Mr. Noland all qualifying pounds of halibut and sablefish landed from the F/V MISTRESS during that period of time; and (3) issue any resultant QS and 1998 IFQ for which Mr. Noland is qualified.

This Decision takes effect on January 14, 1998, unless by that date the Regional Administrator orders review of the Decision.

Because the Appellant will likely receive QS and the corresponding IFQ for the 1998 fishing season, and that in order for him to do so the NMFS Official Record must be amended by January 31, 1998, we 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.

Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, December 26, 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 a Decision on Reconsideration.

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Randall J. Moen  
Appeals Officer

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Edward H. Hein  
Chief Appeals Officer