NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0084
	)	
PROWLER PARTNERSHIP,	)	
Appellant	)	DECISION ON
	)	RECONSIDERATION
and	)	(PART I)
	)	
GAINHART SAMUELSON,	)	
Respondent	)	March 12, 1996
_____	)	

A decision was issued in this appeal on November 8, 1995. The decision concluded, among other things, that one-third of the qualifying pounds resulting from certain sablefish landings made from the F/V PROWLER during the period April 5, 1985, through June 9, 1989, were properly allocated by the Restricted Access Management Division [Division] to Gainhart Samuelson and denied to the Prowler Partnership. The decision also concluded that qualifying pounds for certain sablefish landings from the F/V PROWLER in 1987 and 1988, involving fish caught during research conducted under NMFS contracts, were properly denied to both parties.

After the decision was issued, but before it took effect, the Appellant filed a motion to reconsider the decision. That motion was granted by this office in an order dated March 5, 1996. As stated in the order, the Appellant's Points and Authorities in support of its motion was divided into two parts, which correspond to the two issues decided in the appeals decision. These two issues are distinct and severable. Therefore, in the interest of expediting a decision on reconsideration, I am severing the two issues. The first issue, involving the propriety of the allocation made to the Respondent, is addressed in Part I of this decision on reconsideration. The second issue will be addressed in Part II of the decision, which will be issued separately.

ISSUE

Whether one-third of the qualifying pounds resulting from certain sablefish landings made from the F/V PROWLER during the period April 5, 1985, through June 9, 1989, were properly allocated by the Division to Gainhart Samuelson and denied to the Prowler Partnership.

DISCUSSION

In Part I of its Points and Authorities [P&A] in Support of the Motion to Reconsider, the Appellant makes several arguments, all of which relate to the above-stated issue. Each of these arguments will be addressed in turn.

1. "The Prowler Partnership is the 'qualified person' pursuant to the IFQ regulations and the facts of this case."

In this argument, the Appellant reasserts that it owned the F/V PROWLER during the time in question, and that the Appeals Officer erred by not considering factors outside of the abstract of title to determine vessel ownership. Appellant argues that "all the indicia of ownership except the Abstract of Title point to the Partnership as owning the vessel." Appellant further states that the parties thought that the partnership owned the vessel. [P&A at 2]

As stated in the appeals decision, a United States Coast Guard abstract of title is the best evidence of vessel ownership under the IFQ program. Federal regulation 50 C.F.R. § 676.20(a)(1)(ii) specifically gives Coast Guard abstracts of title first priority among the limited list of documents that may be considered by the Division as evidence of vessel ownership. Absent any evidence that an abstract of title is erroneous or fraudulent, the Division is required to accept that document as proof of ownership. During the appeal, the Appellant did not challenge the validity or accuracy of the abstract of title, which showed that three individuals, including the Respondent, had held an undivided one-third ownership interest in the vessel during the period in question.

Contrary to the Appellant's assertion that the Appeals Officer did not consider other factors, the appeals decision makes clear that other proffered evidence of ownership besides the abstract of title was considered. Specifically, the decision mentions that the Co-Ownership Agreement, signed by all the owners, clearly states that they owned the vessel as tenants in common. The decision also notes that no documents were presented that established the partnership as owner of the vessel. On reconsideration, I note that two other documents relied on by the Appellant support the finding that the Respondent and the other owners held their interests as tenants in common. One document is the sales agreement, dated June 9, 1989, in which the Respondent transferred his one-third interest in the vessel to the other two owners. The agreement lists the buyers as John Winther and Douglas Bart Eaton, not the Prowler Partnership. Throughout the agreement, Winther and Eaton are referred to as "Buyers" not "Buyer." The other document is the release, dated February 10, 1990, in which John Winther and Omega-3, Inc., (not the Prowler Partnership) are stated as the owners of the F/V PROWLER. [Release at ¶ 1] These documents support the view that Messrs. Winther and Eaton purchased the Respondent's interest in the vessel as two individuals, not as a partnership.

On reconsideration, the Appellant argues [P&A at 4] that the manner in which the vessel was *operated* shows that the parties did not recognize the effectiveness of the provisions of the Co-Ownership Agreement in which they stated that

> In no event shall the Vessel be considered to be owned or operated by a partnership composed of the parties and each party acknowledges that he is an independent

> contractor and not a partner or joint venturer with respect to the vessel or to the management or operation thereof. [Sales Agreement, ¶ 3]

This argument is simply an admission that, after representing to NMFS that they owned the vessel as tenants in common (and would not own or operate it as a partnership) in order to receive Capital Construction Funds, the parties did not abide by their word. Nonetheless, the Appellant has provided no evidence that ownership was ever transferred from the individual owners to the partnership. And regardless of how the vessel may have been *operated*, it is *ownership* that controls who receives credit for landings made from the vessel.

On reconsideration, the Appellant for the first time asserts that the partnership leased the vessel from the owners. This assertion is based on the argument that a lease existed because the "partnership exercised a level of control and responsibility for the operation of the Vessel that is the equivalent to a bare-boat charterer or lessee." [P&A at 3] Further, the Appellant argues that the Co-Ownership Agreement contains all provisions consistent with a vessel lease and, therefore, constitutes conclusive evidence of a lease under 50 C.F.R. § 676.20(a)(1)(iii). Finally, the Appellant argues that other evidence in the record concerning the partnership's operation of the vessel demonstrates that the partnership "shouldered the financial risks and burdens of the fishing operation" and, therefore, the partnership is the qualified person who should receive credit for the landings in question.

My response to the Appellant's claim that it held a vessel lease is that it is too late to make this assertion now, on reconsideration. No such claim has ever been made either during the appeal or during the application process. The purpose of reconsideration is to review possible errors or oversights by the Appeals Officer. Reconsideration is not intended, and cannot be used, as an opportunity to present entirely new claims. Thus, I reject as untimely the Appellant's assertion of a vessel lease.

2. "Samuelson sold his interest in Prowler Partnership quota shares when he sold his interest in the vessel and the partnership."

3. "Release confirms Samuelson's sale of partnership interest in IFQs."

4. "Either the partnership is a successor in interest or the successor in interest issue is moot because Samuelson transferred his interest pursuant to the sale agreement and release."

All three of these arguments (#2, 3, & 4) are based on Appellant's alleged purchase of the Respondent's interests in the vessel and the partnership/co-venture. Argument #2 is that by selling these interests, the Respondent sold his interest in any Quota Shares that he would otherwise derive

from those interests. This argument must fail. In Cadden v. Levenhagen and Pugh,[1] this office recognized that the IFQ regulations do not provide for assignments of initial QS eligibility.[2] And in the appeal decision in this case, I noted with approval that the "Division has consistently refused to recognize and enforce private agreements that purport to assign eligibility for the initial issuance of Quota Shares." [Appeal Decision at 7] Regardless of whether the Respondent intended to transfer any eligibility for QS along with the sale of his interests in the vessel and the partnership/co-venture, the Division is not bound by the terms of any such agreement between the parties. The issuance of QS is governed by the IFQ regulations, not by the terms of a private agreement. The Appellant must look to another forum to enforce any contractual rights it may have as a result of the sale agreement.

Aside from what the sale agreement may or may not have transferred to the buyers (Winther and Eaton), the Prowler Partnership itself never owned the F/V PROWLER. It is, therefore, irrelevant that the Respondent may have sold his interest in the partnership to his former partners. The Respondent's eligibility for the initial issuance of quota share was not based on his interest in the partnership. Rather, it was based on his historical interest in the vessel as an individual.

Appellant's argument #3 is that when the Respondent sold his interest in the vessel, he failed to reserve any interest in fishing rights that went with the vessel. This argument is not persuasive. As discussed in Cadden,[3] the IFQ program is not a vessel-based program. Quota Shares are issued to the qualified person who owned the vessel at the time the landings were made, not necessarily to the person who owns the vessel at the time of application for QS. As with argument #2, the transfer of the vessel, with or without a reservation of fishing rights, does not transfer eligibility for the initial issuance of QS.

Argument #4 is that the Appellant is the successor in interest to the Respondent because Messrs. Winther and Eaton continued to operate the F/V PROWLER after Mr. Samuelson sold his interests in the vessel and partnership to them. In the Appellant's view, the partnership/co-venture was never dissolved. In the appeals decision, I did not decide whether the partnership/co-venture that consisted of Messrs. Samuelson, Winther, and Eaton dissolved when Mr. Samuelson sold his interests, nor do I decide that question now. The continuation or discontinuance of the partnership/co-venture is irrelevant to the issue of who should receive credit for the landings in question in this portion of the appeal. The Appellant never owned the F/V PROWLER and is not, therefore, the qualified person with respect to

---

[1] Cadden v. Levenhagen and Pugh, Appeal No. 95-0013, January 17, 1996, *aff'd*, January 18, 1996.

[2] Cadden, at 7

[3] *Id.* at 3, n. 7.

this vessel.[4]

The Appellant further argues that even if Mr. Samuelson was the qualified person individually, the partnership is his successor in interest because it purchased his interests in the vessel and the partnership. The problem with this argument is that, first of all, it is not clear that the Appellant, as opposed to Messrs. Winther and Eaton as individuals, purchased Mr. Samuelson's interests. But even assuming that the Appellant was the buyer, the Appellant still cannot be the Respondent's successor in interest. That is because, in order to be considered a successor in interest under the IFQ program, one must succeed to the entire interest of the entitity that owned (or leased) the vessel.[5] That entity, with respect to the landings and qualifying pounds in question here, is Mr. Samuelson as an individual. He has no successor in interest because he is still alive.[6]

Additional evidence

Along with its Points and Authorities, the Appellant submitted several documents intended to challenge the Respondent's credibility. I have given this evidence no weight because the Respondent's credibility is not in issue. Although in the appeals decision I commented on the parties' competing assertions and affidavits regarding their intent and understandings surrounding the sale of the Respondent's interests and the release document, I did not rely on any evidence based on the Respondent's credibility in reaching a decision in the appeal. Therefore, credibility evidence is not relevant to the issue being decided on reconsideration.

The Appellant also submitted an affidavit of Sammy Parker, the office manager of the Prowler Partnership, who states that he maintained the partnership's books from 1985 until January 1991.. The affidavit discusses the collection and disbursement of proceeds from fishing activities involving the F/V PROWLER. Mr. Parker states that the proceeds went through the partnership's accounts and that the partnership paid for the operating and other expenses of the vessel. He also states that "it was my impression that all of the partners believed that the vessel itself was owned by the Partnership." [Parker

---

[4]This is so, notwithstanding the fact that the Division issued to the Appellant the QS that resulted from the other two-thirds ownership interests held by Mr. Winther and Omega-3, Inc. As in the appeals decision in this case, I do not decide whether that issuance was proper because that is not in dispute in this appeal.

[5]Cadden, at 7.

[6]As noted in the appeals decision at page 8, note 3, an individual qualified person who is still alive can have a successor in interest, but it can only be an entity under which the individual has continued to do business and which was in existence at the time of application for QS. Even then, however, the Division issues Quota Shares in the individual's name, unless the individual requests that they be issued to the successor in interest.

Affidavit, at 3] The affidavit was accompanied by four exhibits, which showed various figures relating to loans, accounts, and calculations. In addition, another affidavit of John Winther, dated December 19, 1995, was submitted. This affidavit reasserted that after purchasing the Respondent's entire interest in the vessel and partnership, the partnership continued to operate the vessel in the same manner as before the purchase. I gave this evidence little weight because eligibility for QS is based on actual vessel ownership, not the method of vessel operation or the parties' professed beliefs about ownership.

FINDINGS OF FACT

1. The Prowler Partnership itself never owned the F/V PROWLER.

2. The Respondent's eligibility for the initial issuance of quota share was not based on his interest in the partnership. Rather, it was based on his historical interest in the vessel as an individual.

CONCLUSIONS OF LAW

1. The purpose of reconsideration is to review possible errors or oversights by the Appeals Officer. Reconsideration is not intended, and cannot be used, as an opportunity to present entirely new claims.

2. The IFQ regulations do not provide for assignments of initial QS eligibility.

3. The transfer of a vessel, with or without a reservation of fishing rights, does not transfer eligibility for the initial issuance of QS.

4. The issuance of QS is governed by the IFQ regulations, not by the terms of a private agreement.

5. To be considered a qualified person's successor in interest under the IFQ program, one must succeed to the entire interest of the entitity that owned (or leased) the vessel.

6. The Appellant is not a qualified person with respect to the F/V PROWLER.

DISPOSITION

That portion of the decision in this appeal, dated November 8, 1995, relating to issue #1 (the issue in this decision on reconsideration, part I) is AFFIRMED. That decision, including the findings of fact, conclusions of law #1, 2, and 3, and the disposition and order to the extent that they pertain to issue #1, are incorporated by reference and made a part of this decision on reconsideration, part I. This decision on reconsideration, part I, takes effect April 11, 1996, unless by that date the Regional Director orders review of it.

In order to ensure that QS and Individual Fishing Quota [IFQ] are issued to the Respondent in time for the start of the 1996 season, I recommend that the Regional Director 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.

Edward H. Hein
Chief Appeals Officer