NOTE: ORIGINAL DECISION APPEARS IMMEDIATELY FOLLOWING DECISION ON RECONSIDERATION.

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0100
	)	
TIGER, INC.,	)	DECISION ON
Appellant	)	RECONSIDERATION
	)	
	)	February 26, 1996
_____	)	

STATEMENT OF THE CASE

A decision was issued in this appeal on November 17, 1995. The decision, among other things, found that the Appellant owned the F/V SILVER ICE from March 16, 1988, through at least December 31, 1991. The decision also concluded, as a matter of law, that claims made on a Request for Application [RFA] form are part of an applicant's application and claim, and are made in a timely manner if the RFA was filed in a timely manner; that the Appellant's claim to additional QS was timely made; that the issuance of QS is subject to appeal within the period for filing an appeal that was in effect at the time of the issuance; and that the Appellant had filed a timely appeal. After the decision was issued, but before it took effect, the Restricted Access Management Division [Division] filed a motion to reconsider the decision. That motion was granted by this office in an order dated February 15, 1996.

ISSUES

1. Whether the appeals decision failed to accurately set out the procedural background of the case.

2. Whether the appeals decision reached "Findings of Fact" that were not relevant to determining the issues on appeal.

3. Whether the appeals decision reached "Conclusions of Law" that were inconsistent with, and not supported by, the implementation of the regulations that govern the halibut and sablefish Individual Fishing Quota [IFQ] program.

4. Whether the appeals decision failed to address an issue addressed in the IAD and appealed by the Appellant.

DISCUSSION

1. Whether the appeals decision failed to accurately set out the procedural background of the case.

The Division correctly points out that the original IAD was issued April 18, 1995, and that the June 14, 1995, IAD was an IAD on reconsideration (which affirmed the earlier IAD). The deadline for filing an appeal of the original IAD was June 19, 1995. Upon the recommendation of the chief of the Division, the Office of Administrative Appeals accepted the Appellant's letter to the Division, dated May 22, 1995, which requested the Division's reconsideration, as an appeal.

2. Whether the appeals decision reached "Findings of Fact" that were not relevant to determining the issues on appeal.

The Division states that factual findings #2 and #3 "are not contrary to, nor do they illuminate, the determinations set out in the IAD(s). Rather, they are simply observations by the Appeals Officer." These findings were:

> 2. Appellant's signing of the application without changes was merely an oversight, and not an intentional, affirmative claim that the Appellant agreed with the official record.
>
> 3. The Appellant's signed application was not intended by the Appellant as a representation that it was abandoning its claim to having owned the vessel earlier than indicated on the application and in the official record.

Although the Division's stated objection to the inclusion of these findings in the decision is that they are irrelevant, the crux of the Division's argument is that the decision improperly awards QS to the Appellant even though the Appellant "failed to exercise care and diligence in its preparation of the application." Further, the Division challenges the finding that the Appellant's signed application did not constitute the Appellant's intentional, affirmative claim for QS, and asks what else an applicant's signature on an application could represent.

Relevance of findings

One of the two issues addressed in the appeals decision was whether the Appellant submitted a timely claim for additional QS. The findings of fact in question related to conclusion of law # 2, which stated that the Appellant's claim was timely.

In order to establish the timeliness of Appellant's claim, it was necessary to make findings of fact that countered the Division's assumptions that the Appellant *in fact* adopted the information printed on the application as its entire claim and, even, that the Appellant was *in fact* abandoning any claims it may have had to the contrary. The Appeals Officers found, by a preponderance of the evidence, that the

Appellant had never intended to accept the Division's official record as its whole claim, nor did the Appellant ever intend to abandon its claim to vessel ownership as stated on its RFA.

These findings related to the timeliness of the claim because the Division's determination that the claim was untimely was based on its conclusion that the Appellant did not inform the Division of the correct vessel ownership dates until at least March 2, 1995. That conclusion ignored the fact that the Appellant had maintained from the beginning -- from the time it submitted its RFA -- that it has owned the F/V SILVER ICE since March 16, 1988, not since April 2, 1990, as indicated in the official record. While the Division may have acted reasonably in assuming that an applicant's signed, unaltered application indicates complete agreement with the official record, *in fact*, for this Appellant the assumption was incorrect. Thus the need to, and relevance of, including findings of fact #2 and #3 in the appeals decision.

Granting relief to one who was not "careful and diligent"

The Division believes that the Appellant did not exercise sufficient care and diligence in reviewing its application form and, therefore, should not be entitled to relief on appeal. The Office of Administrative Appeals disagrees for at least two reasons. First, it is not entirely clear that the Appellant was careless or, at least, that its failure to notice the problem before signing the application was unreasonable and inexcusable. Second, even if the Appellant did not act with sufficient care and diligence to satisfy the Division, that fact would be insufficient grounds to refuse to correct a mistake and grant relief on appeal.

The Division's view that the Appellant was unduly careless in reviewing its application presumes that the application form and accompanying instructions were so clear that a reasonably careful person could not fail to notice any errors or discrepancies. A review of the application materials, however, caused the Appeals Officers to question this presumption. On the application form (Part 2), the boxes that indicated vessel ownership dates were labeled "Eligible Dates First" and "Eligible Dates Last." The accompanying instructions referred to these dates as "the earliest and most recent dates on which IFQ-eligible landings could have been made." In the judgment of the Appeals Officers, these labels and phrases do not clearly indicate that the dates on the form refer to vessel ownership dates.[1] By contrast, the Request for Application (Form D) clearly referred to "Vessel Purchase Date" and "date of sale." We believe that a reasonable applicant could have been confused by the form and instructions, regardless of whether the Appellant was in fact confused thereby.

Even if the Appellant was not as careful in reviewing its application as a reasonable person ought to have been, that fact should not preclude the possibility of obtaining relief on appeal. Our view is that an

[1]Or, more precisely, to the dates during the IFQ qualifying and base years in which the applicant owned or leased the vessel in question.

applicant who made a careless mistake when reviewing the application can still seek to correct that mistake on appeal, as long as the applicant made a timely claim and filed a timely appeal. In our appeal decision in this case, we found that the Appellant had met these requirements.

What does an applicant's signature represent?

The Division asks what else the signature on an application could represent other than the applicant's agreement with the information contained in the application. The fine print immediately preceding the signature states:

> By my signature below, I swear or affirm that all information I have provided hereon is true and correct to the best of my knowledge, and acknowledge that knowingly submitting false or inaccurate information is a criminal offense.

By signing this statement, an applicant swears or affirms that the information *that the applicant provided* on the application is true and correct. Since all of the vessel information on the Appellant's application was provided by the Division, not the Appellant, and since the application did not reflect the information that the Appellant provided on the RFA, one could argue that the Appellant's signature made *no* representations regarding the vessel information that appeared on the application.

The Division acted *as if* the Appellant had signed a statement such as the following:

> By my signature below, I swear or affirm that I have carefully and diligently reviewed all the information that appears on this application, whether it was supplied by me or by the RAM Division, and that this information constitutes my entire claim to quota share [QS], and I hereby abandon any claims I have to the contrary. I hereby waive any right that I may have to challenge the amount of QS that is issued to me on the basis of the information in this application.

The Appeals Officers do not believe that this is what the Appellant's signature on its application represents. Where an applicant makes a mistake (even a careless one) by signing the application without objection to its contents, that mistake cannot be construed as a knowing waiver of the right to appeal the agency's determination regarding the amount of QS to be issued. As we stated earlier, while the Division may have acted reasonably in assuming that an applicant's signed and unaltered application indicates complete agreement with the official record, *in fact*, for this Appellant the assumption was incorrect. We do not fault the Division for making and acting on assumptions that may have been necessary for administering the application and issuance processes efficiently. We believe, however, that this Appellant was entitled to have the error in the official record corrected on appeal for the reasons we have previously stated.

3. Whether the appeals decision reached "Conclusions of Law" that were inconsistent with, and not supported by, the implementation of the regulations that govern the halibut and sablefish Individual Fishing Quota [IFQ] program.

The Division expresses "concern" and "strong disagreement" with the decision's conclusion of law that the issuance of QS is itself an initial administrative determination subject to appeal. The Division raises several objections:

P An applicant who disagrees with the amount of QS issued, based on the official record at the time of issuance, but who has not presented a contrary claim, should not be allowed to appeal the issuance.

P Allowing an applicant to appeal the issuance of QS under the circumstances stated above denies the Division an opportunity to make an initial determination on the applicant's claim. Issuance of QS to an applicant who has not contested the data in the official record is not the equivalent of an initial administrative determination, but merely an automatic, administrative act. Issuance of QS is, however, a non-appealable final administrative determination.

P As a result of the appeals decision, the Division may be required to extend the right of appeal to, and notify, all similarly-situated applicants. This "would throw the entire program into chaos and result in extraordinary (and totally unnecessary) delays and expense."

Initially, it should be noted that the Division is correct when it says that a conclusion of law in the appeals decision is inconsistent with the way the Division implemented the IFQ regulations. Such inconsistency is nothing extraordinary. One would expect that when the Appeals Officers disagree with the way that the Division has interpreted or implemented a regulation, that the conclusions and decision of the Appeals Officers will reflect that disagreement. When rendering the decision in this appeal, the Appeals Officers were aware that the Division did not consider the issuance of QS itself to be an "initial administrative determination" that could be appealed. The decision analyzed the way the Division implemented the program and found that there was a problem that needed to be corrected, at least with respect to this Appellant.

The problem we saw was, first, that the Division used the RFA form to solicit vessel information from the Appellant and made it swear, under the threat of criminal penalty, that the information was true and correct. The Appellant could reasonably have interpreted these actions as indicating that the Division felt the vessel information was important and would be considered. However, the Division, as a matter of course, proceeded to ignore this information. They did not compare the vessel information provided on the Appellant's RFA with the information in the official record. The Division then sent the Appellant a completed application, using vessel ownership dates obtained only from the official record. The Division did not explicitly inform the Appellant that they had disregarded the information on the RFA; to

the contrary, the Division advised the Appellant (in its instructions accompanying the application) that they *had* used the vessel information provided in the RFA to prepare the vessel information that appeared on the application.

Nor did the Division specifically point out that the vessel ownership information in the official record differed from the vessel information the Appellant had supplied on its RFA. Instead, the Division put the burden on the Appellant to notice and point out the discrepancy. When the Appellant failed to do so, and then signed the application without realizing the problem, the Division (understandably) took this to mean that the Appellant had no disagreement with the information in the application (the official record data). The Division then issued QS to the Appellant on December 16, 1994, based on the official record as of that date.[2] After receiving its QS, the Appellant discovered that the vessel ownership dates it had originally provided to the Division on the RFA were never noted or used by the Division in calculating the QS award. When the Appellant sought to correct the problem within 90 federal business days[3] after the QS had been issued, the Division acted as if it had never before been told that the Appellant claimed ownership of the vessel from a date two years earlier than the official record indicated. The Division rejected the Appellant's claim to the earlier vessel ownership date on the grounds that it was too late at that point to be raising the claim *for the first time*.

In the appeals decision, we determined that

- the vessel information on the Appellant's RFA was part of its claim for QS;
- Appellant's signature on the application was not intended as an abandonment of that claim; and
- because the RFA had been timely filed, the Appellant's claim to an earlier vessel ownership date had been timely made, i.e., it had not been raised for the first time only after QS had been issued.

These determinations go to the heart of the concern that the Division now expresses in its motion for

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[2]In the meantime, on October 11, 1994, some two months after sending out the application, the Division sent the Appellant a Quota Share Data Summary [QSDS] that displayed, among other things, information about the F/V SILVER ICE taken from the official record. The QSDS referred to the vessel ownership dates as "Qualifying Date(s)," rather than "Dates of Ownership" (or some other more clear term). Notwithstanding any misunderstanding that could have resulted from terminology used, there is no evidence that the QSDS was or was not reviewed or relied upon by the Appellant. Rather, the Appellant signed the application and returned it on October 24, 1994, less than two weeks after receiving the QSDS.

[3]This was the period for filing an appeal of an IAD that was in effect at that time.

reconsideration. The Appeals Officers agree that the Division would be improperly left out of the process if this office accepted and decided an appeal based on a claim that was never presented to the Division. But where, as in this case, the Division received a timely claim, but chose to disregard it, the Division cannot say that it had no opportunity to consider the claim. Whether the Division denies a claim *explicitly* in a formal written IAD, or *implicitly* by the issuance of QS in an amount less than that claimed, the denial is the Division's initial determination of that claim. Thus, either form of denial constitutes an appealable IAD. We find support for this view in the agency's own statement that applicants who wish to contest their initial issuance of QS must appeal that determination within 90 days of the date of issuance.[4]

We agree with the Division that an applicant who has not presented a timely claim that is contrary to the information on which the QS award was based, should not be granted relief on appeal. Applicants who did not raise a contrary claim on the RFA or application, or in some other manner before the 90-day deadline for substantiating claims or, if no 90-day period was provided, before QS was issued, do not have a timely claim for which relief could be granted on appeal. To the extent that this may not have been clear from the appeals decision, we hope to clarify that point now. The appeals decision does not hold that any applicant who is dissatisfied with the amount of QS issued can appeal that issuance. We will not consider an appeal based on a claim that was never presented to the Division.

We also wish to make clear that the decision in this appeal does not affect applicants whose appeals have already been decided, nor does it affect applicants who have not filed an appeal and whose appeal period following the issuance of their QS has already passed. Thus, we believe the Division's concern, that every applicant who is dissatisfied with their QS award will have a right to appeal the issuance as a result of this decision, is unfounded.

4. Whether the appeals decision failed to address an issue addressed in the IAD and appealed by the Appellant.

Both the original IAD and the IAD on reconsideration determined that no additional IFQ will issue to the applicant until the 1996 season. Although the Appellant did not specifically raise the question of the issuance of IFQ in its appeal statement or accompanying documents, the question is implicitly raised by the Appellant's general appeal of the IADs. The Appellant's attorney had orally raised the question about 1995 IFQ during the course of the appeal, and in its response to the motion for reconsideration, the Appellant again argues that it should have received both QS and IFQ for 1995. The Division recognized in its motion for reconsideration that the appeals decision was issued after the closure of the 1995 fishing season, and stated that the question of IFQ issuance was therefore moot. The Division stated further, however, that this is an important issue that remains unresolved by the failure of the

[4]*See* 57 Fed. Reg. 57,135 (1992).

Appeals Officers to address it in the appeals decision.

The annual allocation of IFQ is governed by 50 C.F.R. § 676.20(f). Under that regulation, IFQ is calculated on the basis of the amount of a person's QS, and the amount of total QS in the pool for a regulatory area, as of noon, Alaska local time, on January 31 of that year. As of January 31, 1995, the QS in question in this appeal had not been issued to the Appellant. Therefore, that QS could not be included in the calculation of 1995 IFQ for the Appellant. There are no provisions in the IFQ regulations for adding new QS to the pool for purposes of the annual calculation of IFQ. Thus, this office is without authority to order the issuance of IFQ to the Appellant for 1995. Despite the Division's statement in its motion for reconsideration that "at the time the IAD was issued (originally in April, 1995), it was not unreasonable to anticipate that a Decision on the appeal could have been rendered prior to the closure of the season," this office could not have ordered the issuance of 1995 IFQ to the Appellant because the Appeal had not been filed until May 26, 1995 -- well past the January 31, 1995, deadline for determining the QS pools.

To the extent that the Division may have had any discretionary authority to issue IFQ to the appellant for 1995, this office could only have requested, not ordered, that the Division so exercise its discretion. But because the Division already had stated in the IADs that, even if reversed on appeal, the Division would not issue additional QS or IFQ to the Appellant until the 1996 season, such a request from this office would have been futile.

CONCLUSIONS OF LAW

1. An applicant for QS who made a careless mistake when reviewing the application can still seek to correct that mistake on appeal, as long as the applicant made a timely claim and filed a timely appeal.

2. Where an applicant makes a mistake (even a careless one) by signing the application without objection to its contents, that mistake cannot be construed as a knowing waiver of the right to appeal the agency's determination regarding the amount of QS to be issued.

3. Applicants who did not raise a contrary claim on the RFA or application, or in some other manner before the 90-day deadline for substantiating claims or, if no 90-day period was provided, before QS was issued, do not have a timely claim for which relief could be granted on appeal.

4. An IFQ administrative appeal may not be based on a claim that was never presented to the Division.

5. This office is without authority to order the issuance of IFQ to the Appellant for 1995.

DISPOSITION

The decision in this appeal, dated November 17, 1995, is AFFIRMED. That decision, including all its findings of fact, conclusions of law, and its disposition and order, are incorporated by reference and made a part of this decision on reconsideration. This decision takes effect March 27, 1996, unless by that date the Regional Director orders review of the decision.

In order to ensure that QS and Individual Fishing Quota [IFQ] are issued to the Appellant in time for the start of the 1996 season, we 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

Randall J. Moen
Appeals Officer

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0100
	)	
TIGER, INC.,	)	DECISION
Appellant	)	
_____	)	November 17, 1995

STATEMENT OF THE CASE

On May 26, 1995, Tiger, Inc., filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on April 18, 1995. The IAD denied Appellant's claim to additional Quota Shares [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program. The Appellant's claim was based on ownership of the F/V SILVER ICE beginning in years earlier than those shown in the Division's official record. The Division denied the Appellant's claim on the grounds that it was not submitted to the Division in a timely manner. The appeal adequately shows Appellant's interests to be directly and adversely affected. No hearing was held concerning the appeal, as the relevant facts are not in dispute.

ISSUES

1. Was Appellant's claim for additional QS submitted in a timely manner?

2. When did Appellant own the F/V SILVER ICE?

BACKGROUND

The Division received the Appellant's signed Request for Application for Quota Share [RFA] on July 15, 1994, the last day for filing a timely application.[1] The RFA included a "Vessel Information Form" [Form D] on which the Appellant stated that it had owned the F/V SILVER ICE since March 16, 1988. As with all RFA forms, the signature on the Form D constituted a sworn statement as to the information provided by the Appellant.[2]

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[1]An RFA is the equivalent of an application for the purpose of meeting the application filing deadline under the IFQ program. See Keith A. Buehner, Appeal No. 94-0001, September 26, 1994, *aff'd* March 2, 1995.

[2]Every RFA form contains the following statement immediately above the signature block: By my signature below, I (1) swear or affirm that all information I have provided hereon is true and correct to the best of my knowledge; (2) waive the confidentiality of fish harvest records maintained by the State and Federal governments, thereby authorizing

In early August, 1994, the Division sent to the Appellant an Application for Quota Share containing information from the Division's database (the Official Record). The application indicated that the Appellant's ownership of the F/V SILVER ICE began on April 2, 1990.[3]
Along with the application, the Division sent to the Appellant 22 pages of "Application Information," which, among other things, advised applicants that:

> The information on your application has been compiled from the Official NMFS IFQ Record . . . and from information that you supplied on your Request for Application forms. ["Application Information" at 1.]

On another page of this packet, the Division stated:

> This form [Part 2 -- Vessel Information] is provided to give you a chance to review information about the vessels in which you held an interest . . ..
>
> . . . NMFS/RAM has used the information you provided in your Request for Application to prepare the information on this form. 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 that you submitted on your Request for Application. ["Application Information" at 11.]

In early October, 1994, the Division sent to the Appellant a Quota Share Data Summary [QS Summary] listing the critical information that would be used by the Division in determining Appellant's QS. Like the application, the QS Summary showed that the Appellant owned the F/V SILVER ICE only since April 2, 1990. The "Explanations and Instructions" that accompanied the QS Summary

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> NMFS to make use of that information to determine the proper allocation of Quota Share to eligible applicants; and (3) acknowledge that knowingly submitting false or inaccurate information is a criminal offense.

[3]The information in the Division's Official Record regarding Appellant's ownership of the F/V SILVER ICE was based solely on Alaska Commercial Fisheries Entry Commission [CFEC] vessel registration records.

advised applicants to review the QS Summary carefully. If an applicant felt that some or all of the information on the QS Summary was in error and chose to contest the error, the Division asked that the applicant:

> Send us a detailed affidavit . . . in which you explain **exactly what is wrong with the information** displayed on the Data Summary and how you believe it should be changed. In short, **make a specific claim** and **provide relevant evidence** that you feel will support it. . . .
>
> **Reminder: All statements and evidence submitted in support of any requested change to the Official Record, as displayed on your QS Data Summary, must be submitted by no later than 90 days after the "Control Date" printed on the top of the QS Data Summary; i.e., by the response date specified on the Data Summary.** [Appellant's response date was January 9, 1995.]
>
> Information submitted after that date will **not** be considered, and any claims that vary from the Official Record will be denied. Although you will be given an opportunity to appeal that determination to a RAM Division Appeals Officer, we expect that resolving appeals could take some time, and you won't receive "Interim" QS while your appeal is being considered. (boldface emphasis in original) ["Explanations and Instructions" at 4-5.]

On October 24, 1994, Appellant signed the Application for QS without making any changes to it or otherwise contesting the information on it. Three days later, on October 27, 1994, the Division received the signed application. On December 16, 1994, the Division issued QS to Appellant based on its ownership of the F/V SILVER ICE during the period April 2, 1990, through December 31, 1991.

On February 8, 1995, the Division received a written request from the Appellant to change the vessel category in which its QS had been issued. Included with the request was a photocopy of a U.S. Coast Guard "Certificate of Documentation," issued February 23, 1989, listing Appellant as the owner of the F/V SILVER ICE. Because the Coast Guard requires proof of ownership before issuing the certificate, this is evidence that the Appellant owned the vessel at least as of the date of issuance. The record also shows that Clydina Bailey, a clerk in the Division, completed a "Staff Request for Authority to Change NMFS Official IFQ Record" on February 8, 1995. The request was to change the vessel ownership dates and was based on the Coast Guard Certificate of Documentation "showing Tiger, Inc., owning the vessel from 23 Feb 89." A "Post-It" note attached to the request form indicates that Ms. Bailey had a telephone conversation with Gary Nothstein, fleet manager for Tiger, Inc., about this request. Another such note shows that an affidavit from Tiger, Inc., regarding vessel ownership would be forthcoming.

On March 2, 1995, the Division received an affidavit of Mark Maring[4] formally requesting that the Division's vessel ownership information be changed to reflect the Appellant's ownership from March 16, 1988, and that additional QS be awarded based on the correct ownership dates. In support of its affidavit, Appellant submitted to the Division: (1) a copy of the U.S. Coast Guard Abstract of Title for the F/V SILVER ICE, which showed Appellant's ownership of the vessel as of March 16, 1988; (2) two National Marine Fisheries [NMFS] permits for the F/V SILVER ICE, dated April 6, 1989, and December 22, 1989, with Appellant listed as owner; and (3) State of Alaska fish tickets and NMFS catch reports for the F/V SILVER ICE, indicating legal landings of halibut and sablefish in 1989 from the F/V SILVER ICE.[5]

On April 14, 1995, the Division received a fax transmittal from Mr. Nothstein asking whether the Division had addressed the affidavit and request, and asking when he could expect to receive a determination. Exactly two months later, the Division issued an IAD denying Appellant's request to change the vessel ownership information in the Official Record on the grounds that the Appellant did not present its claim in a timely manner. The basis for the denial was that the Appellant did not make any changes to the information on the application when returning it to the Division in October 1994, and did not otherwise advise the Division that it disagreed with the vessel ownership dates in the Official Record until after the January 9, 1995, response deadline printed on the QS Summary.

DISCUSSION

1. Was Appellant's claim for additional QS submitted in a timely manner?

The imposition of a 90-day response deadline for raising objections to information appearing in the application or in the QS Summary, and for submitting supporting documentation, reflects the Division's interpretation of 50 C.F.R. § 676.20(d)(1):

> (1) Halibut and sablefish catch history, vessel ownership or lease data, and other information supplied by an applicant will be compared with data compiled by the Regional Director. If additional data presented in an application are not consistent with the data compiled by the Regional Director, the applicant will be notified of insufficient documentation. The applicant will have 90 days to submit corroborating documents (as specified at paragraph (a)(1) of this section) in support of his/her application or to resubmit a revised application. All applicants will be limited to one opportunity to provide corroborating documentation or a revised application in response to a notice of

[4]Mr. Maring is the Secretary/Treasurer of Tiger, Inc. He signed the RFA and the Application on behalf of the company.

[5]The state fish tickets and NMFS catch reports do not indicate ownership of the vessel.

insufficient documentation.

The IAD is premised on the Division's view that a signed application that does not make any changes to the information on the application constitutes an applicant's formal claim for QS. [IAD at 3.] The Division either does not recognize contrary statements made on an RFA as being part of an applicant's claim or it treats the application as superseding any contrary information on the RFA.

Appellant made a claim on its RFA that was inconsistent with the information in the official record. Like most other applicants, the Appellant did not present documents with the RFA supporting its claim of ownership. Despite receiving this inconsistent claim, the Division did not notify the Appellant of the insufficient documentation. Instead, it sent the Appellant a completed application reflecting the Division's data and required the Appellant to notice the discrepancy and reassert its inconsistent claim. By signing the application without noticing the discrepancy and objecting to it at the time [by January 9, 1995], the Appellant, in the Division's view, in effect, abandoned its original claim and waived its right to ever again object to the error in the official record.

Had Appellant reasserted its claim within the 90-day "window" after reviewing the application or the QS Summary, it would have received an express notice of insufficient documentation from the Division specifically pointing out that its claim of ownership dates differed from what the official record showed and advising the Appellant to send in documentation of the ownership dates. If the Appellant had failed to respond to that notice, or if it had responded with inadequate documentation, the Division would have issued a written IAD denying the claim to additional QS based on the earlier ownership dates. The written IAD would have given the Appellant an opportunity to present additional evidence on appeal to establish the correct ownership dates.

Presumably, the Division would recognize that the Appellant had made a timely claim if it had merely penciled in a correction to the ownership dates on the application before signing and returning it to the Division. Yet, in the Division's view, Appellant's failure to notice the discrepancy and make any indication of the error on the application meant that it was foregoing its claim. But Appellant's right to prove its claim on appeal cannot rest on such a minor distinction. Such a narrow interpretation of the regulations ignores the possibility that signing an application without raising any objection to its contents could be the result of an honest (albeit careless) oversight, rather than an affirmative representation that the applicant agrees with everything in the application.

The Division chose to send out completed applications, instead of blank applications, as a convenience to applicants. But this approach put the burden on applicants to "find the errors" in the applications, even though the Division was in a position to identify any discrepancies between the RFA and the official record and specifically point that out to the applicants. The procedure used was akin to the newspaper puzzles that ask readers to "find the differences between these two pictures." While this procedure worked for the vast majority of applicants, at least one applicant did not notice the errors in

the application before signing it, despite admonitions from the Division to review the information carefully. But the fact that the Division's system of verification succeeded in most cases does not mean that the applicant should be punished when the system failed to make the applicant aware of the problem. Ironically, in this case, if the Appellant had filled out the application from scratch, it is likely that it would have entered the vessel ownership dates it believes are correct. In fact, that is what the Appellant did when it completed the RFA.

To the supposed objection that an RFA is not an application, it must be said that, although not mentioned in the IFQ regulations, the Division has treated the RFA as part of an applicant's application and claim. Not only was the RFA accepted as an application for purposes of the application filing deadline [July 15, 1995], but the Division has expressly stated 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. ["Explanation and Instructions" accompanying QS Summary, at 4.]

As to vessel information, the Division told applicants:

> NMFS/RAM has used the information you provided in your Request for Application to prepare the information on this form. ["Application Information" at 11.]

Besides the fact that the Division has, for most purposes, treated an RFA as an application, there is also the matter of the public's expectations. It is reasonable for applicants to presume that their sworn statements on RFA forms provided to them by the Division will be accepted as part of their claim.

Therefore, for purposes of appeal, I find that claims made on an RFA are a part of a person's application and claim, and are deemed to have been made in a timely manner if the RFA was filed in a timely manner. Having once made the claim in a timely manner, an applicant should not be required to restate the claim in order to preserve the right to raise and establish the claim on appeal.

In this case, the Appellant from the beginning has claimed to have owned the F/V SILVER ICE from March 16, 1988. That was so stated and sworn to on the Appellant's RFA, which was timely filed. It is true that the Appellant, without objection, signed an application prepared by the Division that conflicted with information provided by the Appellant in its RFA. But based on the Appellant's continuing claim that its ownership of the vessel predated that shown in the official record, I find that Appellant's signing of the application without changes was merely an oversight, and not an intentional, affirmative claim that the Appellant agreed with the official record. Nor was the signed application intended by the Appellant as a representation that it was abandoning its claim to earlier ownership of the vessel. Therefore, I find that the Appellant's claim to additional QS, based on ownership of the F/V SILVER ICE from 1988, was presented in a timely manner.

I note here that if the Appellant had not claimed earlier ownership of the vessel on its RFA, and had it raised this matter for the first time only after the January 9, 1995, response date, the result in this appeal would have been different. The fact that the claim was first made on the RFA was critical to my finding that the claim was presented in a timely manner.

Even where an applicant has made a timely claim, once the Division has denied that claim, the applicant does not have an unlimited time to object. The objection must be raised within a reasonable time after the denial. That is what the appeal filing period is for. In the usual case in which an applicant's claim is denied, the Division issues a written IAD specifically informing the applicant of the denial and the reasons for it. In addition, the applicant is afforded an opportunity to file an appeal to this office within the period of time prescribed in the IFQ regulations, and is so informed in the IAD.

Where, as in this case, an applicant has mistakenly signed its application without noticing incorrect information contained in it, the Division issues QS based on the data in the official record, but does not issue a written IAD. Nonetheless, the issuance of QS constitutes an *initial administrative determination* because it represents the Division's findings with respect to the issuee's application for QS.[6] That is to say, the issuance of QS is itself an appealable IAD. If an issuee disagrees with the amount of QS issued (or, for that matter, any other aspect of the QS award), the issuee has a right to appeal the award within the appeal period specified by regulation.[7]

The Appellant in this appeal was issued QS on December 16, 1995. The period for filing an appeal in effect at that time was 90 federal working days.[8] The Appellant's filing deadline, therefore, was April 27, 1995. Under 50 C.F.R. § 676.25, an appeal must be in writing and must state why the IAD has a direct and adverse effect on the applicant. On February 8, 1995, Appellant by telephone requested the Division to change the Official Record to reflect Appellant's ownership of the F/V SILVER ICE, as of March 16, 1988. On February 24, 1995, Appellant sent an affidavit to the Division in support of its request, attesting to ownership of the F/V SILVER ICE since 1988, and requesting additional QS on

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[6]"Initial administrative determinations are the findings of NMFS staff on eligibility for, and the transfer and use of, quota share (QS) and IFQ under the IFQ program." 59 Fed. Reg. 28,281 (1994).

[7]Conceivably, this would be true even if the QS were issued as the result of an appeal. If the issuee believed there was an error in the QS award, the issuee could file an appeal. Questions that had already been determined in the prior appeal would be *res judicata* and could not be reargued in an administrative appeal. As a practical matter, however, mistakes in the issuance of QS could be rectified administratively by the Division.

[8]60 Fed. Reg. 6448 (1995); *see also,* letter from Alaska Regional Director Steven Pennoyer to RAM Division Chief Philip Smith, dated December 28, 1994, which stated that an applicant receiving an IAD prior to the adoption of the amendments to the appeals regulations would have 90 federal working days during which to file an appeal.

that basis. It also sent a fax to the Division on April 14, 1995, requesting consideration of its affidavit. The Appellant asserted in these writings that it had not received full QS due to the failure of the Division to recognize its ownership of the F/V SILVER ICE as of March 16, 1988. Since Appellant's written assertions were submitted to the Division within 90 federal business days after the issuance of QS (before April 27, 1995), I find that they met the requirements for the filing of a timely appeal.

Because, prior to the issuance of this decision, it may not have been apparent to the Appellant or the Division that the issuance of QS constituted an appealable IAD, and because the Division subsequently issued a written IAD, I accept the Appellant's written filings described above as part of the instant appeal. I thus find that the Appellant has properly raised the issue of vessel ownership dates in this appeal. Although I could conclude this decision with the finding that the Appellant's claim was presented to the Division in a timely manner, and leave it to the Division to determine the merits of the claim, I will proceed to decide the issue based on the record, including documents submitted on appeal, as a matter of administrative economy.

2. When did Appellant own the F/V SILVER ICE?

Federal regulation 50 C.F.R. § 676.20(a)(1)(ii) provides:

> (ii) Evidence of vessel ownership shall be limited to the following documents, in order of priority:
>
> (A) For vessels required to be documented under the laws of the United States, the U.S. Coast Guard abstract of title issued in respect of that vessel;
>
> (B) A certificate of registration that is determinative as to vessel ownership; and
>
> (C) A bill of sale.

Appellant claimed on its RFA that it owned the F/V SILVER ICE since March 16, 1988. The Division's official record showed ownership by the Appellant only since April 2, 1990. Appellant's affirmation on the RFA was not sufficient proof of ownership. The Division could not amend its official record unless the Appellant had submitted at least one of the documents specified in the regulation. Because the Division had not received such evidence from the Appellant by the response date of January 9, 1995, the Division issued QS to the Appellant on December 16, 1994, on the basis of the vessel ownership dates shown in the official record.

On appeal, the Appellant has presented a U.S. Coast Guard abstract of title showing that the Appellant purchased the F/V SILVER ICE on March 16, 1988. The record also includes a U.S. Coast Guard Certificate of Documentation for the F/V SILVER ICE, issued to the Appellant on February 23, 1989. The certificate was valid for at least one year. This document constitutes a "certificate of registration" under 50 C.F.R. § 676.20(a)(1)(ii). Therefore, I find that the Appellant has established that it owned

the F/V SILVER ICE from March 16, 1988, through at least December 31, 1991, which is the latest date of relevance for IFQ purposes that is shown in the Division's official record.

FINDINGS OF FACT

1. Appellant owned the F/V SILVER ICE from March 16, 1988, through at least December 31, 1991.

2. Appellant's signing of the application without changes was merely an oversight, and not an intentional, affirmative claim that the Appellant agreed with the official record.

3. The Appellant's signed application was not intended by the Appellant as a representation that it was abandoning its claim to having owned the vessel earlier than indicated on the application and in the official record.

CONCLUSIONS OF LAW

1. Claims made on an RFA are a part of an applicant's application and claim, and are deemed to have been made in a timely manner if the RFA was filed in a timely manner.

2. The Appellant's claim to additional QS, based on ownership of the F/V SILVER ICE from 1988, was presented in a timely manner.

3. The issuance of QS is an initial administrative determination [IAD] that is subject to appeal within the period for filing an appeal that was in effect at the time of the issuance.

4. The Appellant's written assertions submitted to the Division within 90 federal business days after the issuance of QS (before April 27, 1995) met the requirements for the filing of a timely appeal.

5. The Appellant has properly raised the issue of vessel ownership dates in this appeal.

DISPOSITION AND ORDER

The Division's initial administrative determination denying Appellant's application for additional QS as untimely presented is VACATED. The Division is ordered to amend the official record to reflect that the Appellant was the owner of the F/V SILVER ICE since March 16, 1988, and to process the Appellant's claim for additional QS accordingly. This decision takes effect on December 18, 1995, unless, by that date, the Regional Director orders review of the decision.

Edward H. Hein
Chief Appeals Officer

Randall J. Moen
Appeals Officer