NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0116
	)	
ALASKA OCEAN FISHERIES, INC., Appellant	)	DECISION
	)	
	)	September 30, 1999
	)	

STATEMENT OF THE CASE

Appellant Alaska Ocean Fisheries, Inc., filed a timely appeal of an Initial Administrative Determination [IAD] issued on May 3, 1995, by the Restricted Access Management [RAM] program.[1] The IAD denied the Appellant's application for sablefish quota share [QS] under the Individual Fishing Quota [IFQ] program because the Appellant failed to prove that it owned or leased a vessel that made legal landings of sablefish during the QS qualifying years of 1988, 1989 or 1990.

Appellant has adequately shown that its interest is directly and adversely affected by the IAD. Appellant requested an oral hearing to prove that an unloading report of Seward Fisheries was sufficient evidence of a legal landing on June 6, 1990. Because there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered.[2]

ISSUES

1. Did RAM properly deny the Appellant's application for sablefish QS on the grounds that there was insufficient evidence of qualifying sablefish landings?

2. Does the criteria used by NMFS for determining QS unlawfully discriminate against persons who made substantial investments in the halibut and sablefish fisheries?

DISCUSSION

1. Did RAM properly deny the Appellant's application for sablefish QS on the grounds that there was insufficient evidence of qualifying sablefish landings?

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[1]The Restricted Access Management Division was renamed Restricted Access Management Program, effective September 28, 1997. [NOAA Circular 97-09].

[2]*See*, 50 C.F.R. § 679.43(g), formerly 50 C.F.R. § 676.25(g)(3)(iii). All IFQ regulations were renumbered, effective July 1, 1996. *See,* 61 Fed. Reg. 31,270 (1996). The wording of the regulation was unchanged by the renumbering.

To qualify for sablefish QS under the IFQ program, as implemented by RAM, a person must have owned or leased a commercial fishing vessel, from which legal landings of sablefish were made during a QS qualifying year, 1988, 1989, or 1990.[3] A "legal" landing of sablefish means sablefish harvested with fixed gear and landed in compliance with state and Federal regulations in effect at the time of the landing.[4] This Office has concluded in previous appeals decisions that state fish tickets and federal catch reports are the only evidence that can be used to prove legal landings of halibut or sablefish.[5]

The RAM Official IFQ Record shows no legal landings of sablefish from a vessel owned or leased by the Appellant during the QS qualifying years. The Appellant submitted to RAM a letter claiming that it had landed 37 pounds of sablefish at Seward Fisheries, Inc., in Seward, Alaska, on June 6, 1990. The Appellant also submitted a copy of a processor's landing report as evidence of the claimed landing. The Appellant did not submit an Alaska fish ticket for the landing. There is no such fish ticket in the record, nor is there any evidence in the record that Appellant's claimed sablefish landing was ever recorded on a state fish ticket or federal catch report. Thus, I find that there is insufficient evidence in the record to prove that the Appellant's vessel made a qualifying landing of sablefish. Therefore, I conclude that the Appellant is not a qualified person for sablefish QS and that RAM properly denied the Appellant's sablefish application.

I note that irrespective of the absence of a state fish ticket or federal catch report, the unloading report submitted by the Appellant is by itself insufficient evidence of a legal landing. The report is unsigned and inadequately dated, and it does not show when the fish were landed, where the fish were harvested, the type of gear used to harvest the fish, and who purchased or received the fish. Thus, even if it could be shown that a state fish ticket or federal catch report for the claimed landing was in fact lost or destroyed, the information found on a state fish ticket or federal catch report that is necessary for a legal landing was not provided by the Appellant.

2. Does the criteria used by NMFS for determining QS unlawfully discriminate against persons who made substantial investments in the halibut and sablefish fisheries?

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[3] *See*, 50 C.F.R. §679.40(a)(2), formerly 50 C.F.R. §676.20(a)(1).

[4] 50 C.F.R. § 679.40(a)(3)(v)(A).

[5] *See*, Sonya Corazza, Appeal No. 95-0026, September 30, 1998; and Jack C. Kvale , Appeal No. 95-0103, September 30, 1998. *See, also,* 50 C.F.R. § 679.40(a)(3)(v)(B). Nonetheless, we do not exclude the possibility that an appellant, having established that state fish tickets or federal catch reports had been properly completed and submitted but subsequently lost or destroyed, could use other evidence to prove the information that was originally on the fish tickets or catch reports. That is not the case here, however.

The Appellant contends that NMFS erred in establishing the criteria for the initial allocation of QS. Appellant argues that by using an applicant's prior average harvest record, NMFS discriminates against those who made substantial investment in the fisheries, but who were not able to establish a harvest record for various reasons.

The criteria for determining QS is in the IFQ regulations. The IFQ regulations were duly promulgated by NMFS through notice and comment rulemaking pursuant to the requirements of the Administrative Procedure Act, 5 U.S.C. § 533 (1988). An Appeals Officer is required to presume the legality of the agency's duly promulgated regulations.[6] Consequently, challenges to the legality of the IFQ regulations are not within the purview of this Office. Therefore, this Office does not have the authority to invalidate or set aside the criteria for QS in the IFQ regulations, on grounds that it is illegal or discriminatory. Such broad authority lies with the courts. I note that the IFQ regulations have been upheld by the federal court as a permissible exercise of the Secretary of Commerce's authority.[7]

On appeal, the Appellant also asserts that NMFS erred by denying it credit for certain halibut landings. A review of the record shows that RAM's IAD in this case mistakenly informed the Appellant that it was not eligible for halibut QS. In fact, Appellant was issued *halibut* QS, based on landings of halibut made from the F/V DOLPHIN in 1990.[8] Given that Appellant did not produce evidence of additional landings of halibut from the vessel, I conclude that Appellant was issued the correct amount of halibut QS. Thus, the Appellant's expressed concern regarding his halibut QS appears to have been the result of a misunderstanding and is without merit.

FINDINGS OF FACT

1. There is insufficient evidence in the record to prove that the Appellant's vessel made a qualifying landing of sablefish.

CONCLUSIONS OF LAW

1. State fish tickets and federal catch reports are the only evidence that can be used to prove legal landings of halibut or sablefish

2. The Appellant is not a qualified person for sablefish QS and that RAM properly denied the

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[6]*See, e.g.*, Charles J. Petticrew, Appeal No. 95-0008, July 3, 1996; George Ramos, Appeal No. 94-0008, Regional Director's Decision on Review, at 4, April 21, 1995.

[7]*See,* Alliance Against IFQs v. Brown, et al, Opinion No. 95-35077, May 22, 1996 (9th Cir. 1996).

[8]*See*, Appellant's QS Data Summary and Appellant's application for halibut QS.

Appellant's sablefish application.

3. Challenges to the legality of the IFQ regulations are not within the purview of this Office.

DISPOSITION

The IAD denying the Appellant's application for initial sablefish QS is AFFIRMED. This decision takes effect on November 1, 1999, unless by that date the Regional Administrator orders review of the decision.

Any party, including RAM, 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, October 12, 1999. 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.

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Randall J. Moen
Appeals Officer