NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0128
	)	
HUGH R. WISNER,	)	
Appellant	)	
	)	DECISION
and	)	
	)	
CRAIG A. SCHAUFF,	)	
Respondent	)	October 25, 1996
_____	)	

STATEMENT OF THE CASE

On August 14, 1995, Appellant Hugh Wisner filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on June 14, 1995. The IAD found that Mr. Wisner did not qualify for halibut quota share [QS] derived from the landings of the F/V DESPERADO between April 15, 1989, and September 30, 1989, under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish, due to the lease of the vessel during that period of time to Respondent Craig Schauff. The IAD allocated the qualifying pounds during that period to Mr. Schauff, and denied the same to the vessel's owner, Mr. Wisner. Mr. Wisner has adequately shown that his interest is directly and adversely affected by the IAD.

An oral hearing was held June 5, 1996, at Homer Alaska before Appeals Officer, James C. Hornaday. Mr. Wisner appeared in person; Mr. Schauff appeared by telephone. The parties were given until June 15, 1996, to supplement the record.

ISSUES

1. Whether a valid vessel lease existed between the parties.

2. Whether and when the vessel lease was in effect.

3. Whether Mr. Wisner's due process rights were violated.

BACKGROUND

Mr. Wisner indicated on his Request for Application [RFA] and Application for QS that he did not lease the F/V DESPERADO to anyone. Meanwhile, Mr. Schauff indicated on his RFA that he had leased the vessel from Mr. Wisner between April 15, 1989, and September 30, 1989. In support of

his claim, Mr. Schauff submitted a copy of a "Bare Boat Charter" [Charter] signed by both parties on April 15, 1989, for the 1989 commercial herring, halibut, and salmon seasons, from April 15, 1989, to September 30, 1989.

The charter provided, among other things, that Mr. Schauff was required to:

- pay Mr. Wisner 45% of the gross fishing proceeds as rent;
- serve as master of the vessel;
- reimburse Mr. Wisner for the cost of insurance;
- keep the vessel seaworthy;
- control, possess, command the vessel;
- indemnify Mr. Wisner against claims, actions, proceedings, damages, and liabilities;
- furnish the crew; and
- pay all of the vessel's operating expenses.

Mr. Schauff submitted copies of fish tickets as proof of halibut landings from the F/V DESPERADO during the period of the alleged lease. In a letter to the Division, dated May 17, 1995, at page 2, Mr. Wisner's attorney, Mr. Walter Mason, writes:

> Though a charter document was signed, Mr. Schauff operated the boat as an employee of the F/V Desperado, Inc., and none of the required elements of a charter were present. Proceeds from the halibut fishery were paid to Mr. Wisner, and his bookkeeper prepared settlement sheets and checks for each of the crewmen who were employed by the corporation to fish for halibut. Mr. Wisner continued to pay for insurance, fuel, fresh water, port charges, wharfages, drydocking, lines, and other things which would have been Mr. Schauff's responsibility had this been an actual charter.

In support of the letter, Mr. Wisner affirmed that he had "... signed bareboat charter agreements with Craig Schauff and George Schmitz, but the parties never operated under those charters." He also produced settlement sheets showing that Mr. Schauff was the operator of the vessel, and 1989 IRS forms [1099] showing payments of fishing boat proceeds by Mr. Wisner to Mr. Schauff.

DISCUSSION

1. Did a valid vessel lease exist between the parties?

Under the IFQ program, as implemented by the Division, an applicant for QS may receive credit only for legal landings of Pacific halibut or sablefish that were made from a vessel that the applicant (or the applicant's successor-in-interest) owned or leased at the time of the landings. 50 C.F.R. §

679.40(a)(2).[1] A written vessel lease can be conclusive evidence of the existence of a vessel lease between the parties. 50 C.F.R. § 679.40(a)(3)(iii).[2] To be conclusive evidence, a written lease must identify the leased vessel, the name of the lease holder, and the period of time during which the lease was in effect. Id. Where, as in this case, an applicant has submitted a written document said to be a vessel lease, the appropriate inquiry on appeal is whether the document on its face actually constitutes a vessel lease for purposes of the IFQ program.

The inquiry into whether a document constitutes a valid vessel lease begins with an examination of the provisions in the document itself, rather than with other evidence concerning the intent or actual conduct of the parties. In the absence of evidence challenging the validity of the agreement, a document that contains provisions consistent with a vessel lease is conclusive evidence of the existence of a vessel lease between the parties, and the inquiry on that question need go no further. However, evidence that the agreement was invalid (void) *ab initio*, such as evidence of fraud, duress, coercion, or incapacity, is always relevant and should be considered.[3]

Mr. Wisner does not argue that the document in question is invalid, nor is there any such evidence in the record. Therefore, we look to the provisions of the document itself to determine whether it constitutes a valid vessel lease.[4]

The title of a document and the terminology used in the document are relevant evidence of whether the parties intended the document to constitute a vessel lease. The document in this appeal is entitled

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

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

[3]If the Appeals Officer finds that a written document does not constitute a valid agreement between the parties, the document may still be considered as relevant evidence of the relationship between the parties, along with other evidence of the parties' actual conduct and intent.

[4]Although neither the IFQ regulations nor our decisions have defined the elements of a vessel lease, several appeals decisions have determined whether particular written or oral agreements constituted vessel leases. *See, e.g.,* Ocean Crest Fisheries, Inc., v. McKee, Appeal No. 95-0101, October 13, 1995, *aff'd,* October 19, 1995; Dietrick v. Weikal, Appeal No. 95-0109, February 27, 1996, *aff'd,* March 4, 1996; O'Rourke v. Riddle, Appeal No. 95-0018, May 18, 1995, *aff'd,* May 23, 1995; Kristovich v. Dell, Appeal No. 95-0010, March 20, 1996, *aff'd,* March 27, 1996; Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996, *aff'd,* August 20, 1996; Gillman v. Bell, Appeal No. 95-0091, August 2, 1996; Gates v. B-Boats, Inc., and Della Marlyne, Inc., Appeal No. 95-0137, August 2, 1996, *aff'd,* August 21, 1996; Weikal v. Cole, Appeal No. 95-0054, September 16, 1996; F/V Determined Partnership v. Big Blue, Inc., Appeal No. 95-0049, October 22, 1996.

"BARE BOAT CHARTER," the parties are referred to as "owner" and "charterer," and the words "rent" or "charter hire" are used. Such language, while not in itself determinative, is consistent with a vessel lease and indicates the intent of the parties to create a vessel lease. Use of the word "lease" or "charter" is highly persuasive, even when not conclusive.[5] The document provides that Mr. Schauff, as charterer, is responsible for the operating expenses of the vessel; has the exclusive possession, control, and command of the vessel; must pay 45% of the vessel's gross proceeds as rent for the use of the vessel; and has use of the vessel for a definite duration of time. Mr. Schauff is required to indemnify the owner for uninsured loss; reimburse the owner for the cost of insurance; and serve as the sole master of the vessel. The document does not restrict Mr. Schauff's use of the vessel, as long as it is used as a commercial fishing vessel. He may not, however, assign to another his right as the master of the vessel.

Looking at the document as a whole, all of the provisions are consistent with a vessel lease. Consequently, I find that the document constitutes a valid vessel lease. Because the document identifies the leased vessel, the name of the leaseholder, and a period of time during which the agreement was to be in effect, as required by the regulations, I conclude that the document constitutes conclusive evidence of a vessel lease between the parties.

2. Whether and when the vessel lease was put into effect.

Having determined that there was a valid vessel lease between the parties, the next question is when was it in effect. This office has ruled that a valid written vessel lease is presumed to have been in effect for the term stated in the document, unless contrary evidence persuades otherwise.[6] Evidence of subsequent conduct of the parties can be introduced to show that a lease was terminated before the end of the stated term. In this case, the stated term in the vessel lease was April 15, 1989, to September 30, 1989.

Mr. Wisner argues that, in fact, the agreement was never put into effect. He asserts that the evidence of the parties' actual conduct shows that, for the entire period of time in which the lease is said to have been in effect, they did not operate under a lessor-lessee arrangement. Mr. Wisner acknowledges that the parties never discussed changing the terms of their relationship or terminating the lease, nor did they destroy the lease document, nor did they execute any writing that superseded the lease. In essence, Mr. Wisner asserts that the parties' conduct speaks for itself, and that it is evidence that Mr. Schauff silently acquiesced in Mr. Wisner's unstated desire to cancel the lease.

In considering Mr. Wisner's arguments, I cannot disregard the written bareboat charter, which I have

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[5] *See* Kristovich v. Dell, Appeal No. 95-0010, March 20, 1996, *aff'd* March 27, 1996.

[6] *See* Dittrick v. Weikal, Appeal No. 95-0109, February 27, 1996, *aff'd* March 4, 1996.

already determined is conclusive evidence of the existence of a vessel lease. Mr. Wisner cannot prevail merely by showing that the parties' conduct during the stated term of the lease differed from the provisions of the document. To rebut the presumption that the lease was in effect for the stated term, he must demonstrate by a preponderance of the evidence that the parties agreed to set aside their lease or terminate it prematurely. In the absence of a subsequent written rescission, or an oral rescission plus other consistent conduct, the Appellant must produce evidence of actual subsequent conduct by the parties that (1) clearly establishes that the nature of the parties' business relationship was fundamentally changed; and (2) strongly supports an inference that the parties mutually intended to so change their relationship.

In this case, Mr. Wisner is attempting to show that the parties' conduct diverged from the provisions of the lease to such a degree that one can infer that they implicitly rescinded the lease and never operated under its terms.

I reviewed all the paragraphs of the document with the parties, one by one, at the hearing. Of the 27 numbered paragraphs, the parties agreed that they abided by all but three: paragraphs #12 [control and indemnity of the vessel], #13 [duties of the charterer], and #17 [fuel and stores]. Among other things, the parties agreed that Mr. Schauff was the master of the vessel; Mr. Wisner received 45% of the vessel's gross proceeds; the vessel was fished in the agreed areas; the vessel was returned to the owner at the end of the stated term; Mr. Wisner never told Mr. Schauff that the charter was terminated, either in writing or by word of mouth; that Mr. Wisner was not on the vessel; that the landings were made by, and credited to, Mr. Schauff; and that one bookkeeper was used to provide figures and checks.

Mr. Wisner testified that he controlled the vessel's navigation, directed the harvesting and marketing of the fish, paid the crew and vessel's operating expenses, treated the operation as his business for tax purposes, and had veto power as to the hiring and firing of the crew. Mr. Wisner's records show that crew payments and operating expenses were deducted from the vessel's gross proceeds prior to the distribution of percentages to the parties. Mr. Wisner submitted statements from canneries and a boat builder as proof that he directed the vessel's fishing operations. He testified that the bookkeeper worked for him.

Mr. Schauff argues that he was free to choose where to fish and to market the fish; that payments for operating expenses were deducted from the vessel's gross proceeds; that he had the right to hire and fire the crew; and that he, not Mr. Wisner, was on the vessel. Mr. Schauff did not submit a copy of his federal tax return to prove that he had treated the operation as his business. Mr. Schauff testified that all the accounting went through one bookkeeper for reasons of simplicity.

As to the matters in dispute, I find that Mr. Schauff was in control of the vessel because he was on the vessel as master, and Mr. Wisner was not on the vessel. I discount the statements from the boat builder and the cannery employees concerning Mr. Wisner's control of the vessel because there is no

evidence that they had first-hand knowledge of who directed the relevant fishing operations. I find that the cost of insurance, the vessel's trip expenses, and the crew's compensation were paid from the gross fishing proceeds.

Mr. Wisner claims that he entered into the charter solely to limit his liability as a boat owner, upon the advice of his attorney and his insurance agent. He also asserts that he needed to comply with unspecified federal requirements that crew contracts be in writing and kept on board the vessel. I give these arguments no weight because (1) Mr. Wisner's motivation for entering into the charter is irrelevant to the question of whether and when the lease was put into effect; and (2) I know of no federal requirement that crew contracts be in the form of a bareboat charter.

In only one other case has this office found that a valid vessel lease was terminated prematurely. That was in the case of Dittrick v. Weikal, in which the parties stipulated that the claimed lessee had returned the vessel to the owner before the end of the stated lease term. Landings made from the vessel during the remainder of the stated lease term, when the claimed lessee no longer had possession of the vessel, were credited to the owner. In Dittrick, the parties were in agreement that their arrangement, however characterized, was terminated early. It was clear from the parties' conduct in that case that they intended to end their business relationship earlier than planned.

In contrast, Mr. Wisner and Mr. Schauff disagree about the nature and significance of their conduct during the stated lease term. Also, unlike the parties in Dittrick, they continued on with their business relationship, and Mr. Schauff continued to possess and operate the vessel, for the entire period contemplated in the lease document. The parties' conduct, on the whole, was not fundamentally different from that called for under the terms of the charter, and it does not support an inference that the parties mutually intended and agreed to set aside the written lease. Accordingly, I find that Mr. Wisner has not overcome the presumption that the parties operated under the charter during the period of time in question. Therefore, I conclude that the charter was in effect for the stated term, April 15, 1989, through September 30, 1989.

3. Whether Mr. Wisner's due process rights were violated.

Mr. Wisner claims that IFQ regulation 50 C.F.R. § 679.43(a)(3)(iii)[7] is arbitrary, unreasonable, and ultra vires, i.e., beyond the scope of power granted to the U.S. Department of Commerce and authorized by the U.S. Congress. This challenge to the legality of the IFQ regulations is not within the purview of this Office. An Appeals Officer must presume the legal validity of the agency's own duly

[7] *See* note 2.

promulgated regulations.[8] The IFQ regulations in question were duly promulgated through notice and comment rulemaking pursuant to the requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1988).[9] The AO has no authority to invalidate IFQ regulations and to order the relief sought on the grounds that the regulations are unconstitutional. Such broad review authority lies with the courts, and Mr. Wisner's redress on this legal argument must be sought in that forum. I note, however, that the IFQ regulations have been recently upheld as a permissible exercise of authority by the Secretary of Commerce.[10]

Mr. Wisner also claims that his substantive due process rights have been violated, and that the IAD was arbitrary, capricious, and an abuse of discretion. IFQ regulation 50 C.F.R. § 679.40(f)[11] provides that QS is not a property right subject to the "takings" provision under the Fifth Amendment of the U.S. Constitution. Consequently, Mr. Wisner's claim that his QS was an unlawful taking of property is without merit. Furthermore, I find that his claim that the IAD was arbitrary, capricious, and an abuse of discretion is moot because that shortcoming (even if true) has been substantially, if not completely, rectified by the granting of *de novo* review on appeal by this office.

FINDINGS OF FACT

1. Mr. Wisner and Mr. Schauff entered into a valid written agreement, entitled "BAREBOAT CHARTER," for the F/V DESPERADO, dated April 15, 1989.

2. The charter contains the terminology and characteristics of a vessel lease.

3. The charter identified the leased vessel, the F/V DESPERADO; the name of the lease holder, Mr. Schauff; and the period of time during which the lease was to be in effect, April 15, 1989, through September 30, 1989.

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

[9]*Id.*, at 2. *See*, 58 Fed. Reg. 59,375 (1993).

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

[11]Formerly 50 C.F.R. § 676.20(g) which reads: "Quota shares allocated or permits issued pursuant to this part do not represent either an absolute right to the resource or any interest that is subject to the "takings" provision of the Fifth Amendment of the U.S. Constitution. Rather, such quota shares or permits represent only a harvesting privilege that may be revoked or amended subject to the requirements of the Magnuson Fishery Conservation and Management Act and other applicable law."

4. Mr. Wisner has not overcome the presumption that the parties operated under the charter during the period of time in question.

5. The charter was in effect for the stated term, April 15, 1989, through September 30, 1989.

6. Mr. Wisner's claim that the IAD was arbitrary, capricious, and an abuse of discretion is moot.

CONCLUSIONS OF LAW

1. The charter constitutes a vessel lease for purposes of QS under the IFQ program.

2. The charter is conclusive evidence of the existence of a vessel lease between the Mr. Wisner and Mr. Schauff.

3. Mr. Wisner's claim that his QS was an unlawful taking of property is without merit.

4. Mr. Schauff qualifies for halibut QS for the stated term of the BAREBOAT CHARTER, April 15, 1989, through September 30, 1989.

DISPOSITION

The IAD that was the subject of this appeal is AFFIRMED. This decision takes effect on November 25, 1996, unless by that date the Regional Administrator orders review of the decision. Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 10 days after the date of this decision, November 4, 1996.

James C. Hornaday
Appeals Officer

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

Because the prevailing party in this appeal still has an opportunity to receive QS and the corresponding IFQ for the 1996 fishing season, 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.

Edward H. Hein
Chief Appeals Officer

Randall J. Moen
Appeals Officer