NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0133
	)	
CHARLES A. ADAMONIS,	)	DECISION ON RECONSIDERATION
Appellant	)	
_____	)	February 7, 1997

STATEMENT OF THE CASE

This Office issued a Decision in this appeal on April 5, 1996. The Decision vacated an Initial Administrative Determination [IAD] that had been issued by the Restricted Access Management Division [Division] on July 5, 1995. The IAD had found that the Appellant's claim to certain qualifying pounds of halibut was untimely and, therefore, denied the claim. The Decision concluded that (1) the Appellant's claim to qualifying pounds of halibut resulting from a 1987 landing was timely made; (2) the Appellant should receive credit for the landing; and (3) the resulting qualifying pounds should be allocated to him. The Division disagreed with the Decision and filed a Motion for Reconsideration on May 2, 1996. The Appellant filed a response on May 17, 1996. The motion was granted on June 27, 1996.

ISSUES

1. Whether the Division had the authority to credit Appellant's landing based on a deficient fish ticket.

2. What constitutes an applicant's "claim" for purposes of determining whether the claim was timely made?

3. Whether the Decision would result in a denial of due process to similarly situated applicants.

BACKGROUND

The Decision in this appeal found that the Appellant's claim of a halibut landing, based on a fish ticket dated August 26, 1987, and showing 50,525 pounds[1] of halibut harvested in regulatory area 4A, was

[1]The fish ticket is clearly dated August 26, 1987, but the date in the NMFS/RAM Official Database is listed as August 22, 1987. The fish ticket shows two halibut amounts: Halibut #1 for 50,223 pounds, and Halibut #2 for 302 pounds. These are displayed in separate places in the database, but they are part of the same landing. In his letter to the Division [received March 20, 1995], the Appellant referred to this as a landing of 50,223 pounds. That is the amount stated in the IAD as the amount being denied, although the IAD mentions that a landing of 50,525 pounds on August 27, 1987, was located in the NMFS/RAM Official Database. In his appeal, the Appellant stated the amount as 50,225 pounds. I

timely made. In so deciding, I stated that a fair reading of the Appellant's application is that he was claiming all the halibut legally landed from the F/V TRASK during the period he leased it. The fish ticket had not indicated the type of gear used in harvesting the fish, but evidence submitted and gathered during the appeal persuaded me by a preponderance that longline gear was used and that the landing was legal. Thus, I concluded that the Appellant should receive credit for the landing in question, and so ordered.

In its Request for Reconsideration, the Division objected to the Decision on three grounds. First, the Division stated that the Decision did not properly distinguish between the "data available to the Division (the NMFS 'database')" and the "Official NMFS IFQ Record", and that the Division did not err when it excluded the Appellant's fish ticket from the official record. Second, the Decision failed to recognize that a claim of a vessel lease is "entirely distinguishable" from a claim for pounds, and that Appellant's claim for additional pounds was not presented to the Division until after the deadline for submitting evidence in support of his claims. Third, the Decision would compromise the due process rights of similarly situated applicants by mandating a process that denies the Division an opportunity to decide the merits of a claim before it is presented on appeal. All three of these objections will addressed in turn.

DISCUSSION

1. Whether the Division had the authority to credit Appellant's landing based on a deficient fish ticket.

In its Request for Reconsideration, the Division points out that it

> . . . assembled a comprehensive database, consisting of historic vessel registration, permit, and fish ticket information from the State of Alaska (Department of Fish and Game and Commercial Fisheries Entry Commission), historic catcher/processor and vessel permitting information and weekly production reports from NMFS, and historic fish ticket information supplied by the International Pacific Halibut Commission. From these disparate data sources, the Division created the "Official Record" (referred to in the Initial Administrative Determination as the "RAM Division database"). [Motion, at 3]

Thus, the "Official Record" did not contain the entirety of data gathered by the Division. It was a subset of the "comprehensive" database and included only data that appeared to be relevant to IFQ

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accept the date and amount shown on the fish ticket as the correct data.

determinations and that conformed with requirements set out in the IFQ regulations.[2] One of those regulations, 50 C.F.R. § 679.40(a)(3)(v),[3] specifies that evidence of legal landings shall be limited to state or federal catch reports that indicate, among other things, the gear type used to catch the fish that was landed. The fish ticket that evidenced the landing in question did not indicate the gear type. Therefore, it could not be considered by the Division[4] as evidence of a legal landing. For this reason, the landing was not included in the "Official Record," even though it was contained in the NMFS/RAM Official Database.

For the same reason, the Division states, it was not an error to exclude the fish ticket from the Official Record. I agree. The Decision, however, did not find or assert that the Division had made an error by not including the fish ticket in the Official Record, nor was the Decision meant to suggest that an error had been made. The Decision merely stated, among other things, that a record of the landing in question was in the Division's database, which is accurate.

The Decision also pointed out that the Division, following its standard procedure, did not notify the Appellant (before issuing QS) that the fish ticket was in any way inadequate, that the pounds from that landing were not included in the Official Record, or that he would not receive credit for that landing. The Decision also stated that this appeal would not have been necessary if the Division had included these pounds on the Quota Share Data Summary [QSDS] that it provided to the Appellant for his review. This last statement turns out to have been incorrect.

No regulation prevented the Division from informing applicants about landings that were recorded in the NMFS/RAM Official Database, but which were not included in the Official Record and which were not being credited for IFQ purposes. The Division was not prohibited from placing such information on or with the QSDS, in a separate category, perhaps, or on a separate page. Nonetheless, as a practical matter, it could have been overly burdensome for the Division to identify and notify each applicant of landings that did not appear to be creditable, especially given the large amount of applications and data that the Division had to deal with, and the limited staff and time available for processing applications.

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[2]In the IAD, the Division refers to the "Official Record" as the "RAM Division Database." [IAD, at 2, f.n. 1] The Division refers to the larger database, from which the Official Record is derived, as the "NMFS/RAM Official Database." [IAD, at 4]

[3]Formerly 50 C.F.R. § 676.20(a)(1)(v). All IFQ regulations were renumbered, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1966). The wording of the regulation in question was unchanged by the renumbering.

[4]The limitations on evidence that may be submitted or considered under 50 C.F.R. § 679.40(a)(3)(ii)-(v) [formerly § 676.20(a)(1)(ii)-(v)] do not apply on appeal. Appeals officers are governed by the different evidentiary standard of 50 C.F.R. § 676.43(j) [formerly § 676.25(j)]. Weber v. Kochuten, Appeal No. 95-0122, June 18, 1996.

Furthermore, a deficient fish ticket that lacks an essential piece of information required under the IFQ regulations cannot be considered by the Division as evidence of a legal landing.[5] The Division, therefore, did not have the legal authority to credit Appellant's landing, even if it wanted to. Because the Appellant could obtain relief only through an appeal, there is nothing the Division could have done to obviate the need for the appeal in this case.

2. What constitutes an applicant's "claim" for purposes of determining whether the claim was timely made?

The concepts of "claim" and "timely claim" under the IFQ program are not provided for in the IFQ regulations. These are concepts that have been developed by the Division for administrative purposes. Apparently the idea of a claim derives from the requirement that one must submit an application in order to be considered for an initial issuance of QS. Actually, the regulations do not specifically state that a qualified person cannot receive an initial issuance of QS without first applying. But the requirement of submitting an application is implicit in the provisions of the regulations relating to application forms, an application period, applicants, and the calculation of QS based on uncontested data in applications. *See*, 50 C.F.R. § 679.40(a)(6) [formerly § 676.20(d)].

The Division's IADs indicate that an IFQ "claim" consists of at least that which is asked for in an application. It also includes assertions and evidence submitted to the Division throughout the application phase/process. This Office has held that information submitted on or with a Request for Application [RFA] form is part of an applicant's claim.[6] The Division also considers the data it provides to an applicant on a Quota Share Data Summary [QSDS] to be an applicant's claim, unless the applicant has, within a 90-day response deadline, indicated a disagreement with that data. Where an applicant has not objected to that data, or has not responded after receiving the QSDS, the Division presumes that the applicant agrees with the data and has adopted that as his or her claim. As will be discussed shortly, this is the situation present in this appeal.

The Division requires that an applicant make the entire claim in a timely manner, i.e., not later than 90 days after issuance of a QSDS or a "Notice of Insufficient Documentation." The Division imposes this

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[5]The Division cannot consider a state fish ticket or federal production report as evidence of a legal landing where an essential piece of information is entirely missing, as in this case. The Division may consider a fish ticket or production report that contains erroneous information, and may correct the error if sufficient evidence is submitted by the applicant or otherwise obtained by the Division.

[6]Tiger, Inc., Appeal No. 95-0100, November 17, 1995, *aff'd on reconsideration,* February 26, 1996, *aff'd,* March 4, 1996.

90-day time limit for "perfecting" a claim under the authority of 50 C.F.R. § 679.40(a)(7) [formerly § 676.20(d)(1)]. That section of the regulations provides that information supplied by an applicant will be compared with "data compiled by the Regional Director." The Division has interpreted this to mean only the data in the Official Record, not the data in the NMFS/RAM Official Database. The regulation specifies that if data presented in an application is inconsistent with the "data compiled by the Regional Director," the applicant must be sent a notice of insufficient documentation. In response to this notice, the applicant will then have 90 days to submit corroborating documents in support of the application or to resubmit a revised application. The regulation further provides that all applicants will be limited to one opportunity to submit the documentation or revised application in response to the notice.

If, after the 90-day deadline, an applicant requests or makes a claim for something that, in the Division's judgment, was not included in the claim made before the deadline, or was made but subsequently "abandoned," then the Division deems this to be a new claim. The Division rejects such claims as untimely, without regard to the merits of the claim. This Office has previously agreed with certain aspects of this scheme.[7] In Tiger, Inc., we stated that:

> 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.[8]

The timeliness of a claim, therefore, affects whether the merits of a claim may be considered either on appeal or on remand to the Division. Whether a claim received by the Division after the 90-day response deadline was timely made depends on whether it was, or can be considered to have been, part of the applicant's original (timely) claim. In the Division's view, a claim has not been made unless the applicant has explicitly stated it or has adopted the data presented by the Division in an application or a QSDS. The Division presumes that an applicant who does not timely object to the Division's

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[7]We have not agreed in all respects. For example, in Tiger, Inc., we stated that an applicant who mistakenly signs an application without objecting to its contents has not thereby waived the right to appeal the Division's determination regarding the amount of QS to be issued. [Decision on Reconsideration, at 8] Thus, we do not accept the Division's presumption that an applicant's failure to timely disagree with information supplied by the Division constitutes an abandonment of previous claims.

[8]Tiger, Inc., Appeal No. 95-0100 (Decision on Reconsideration), February 26, 1996, *aff'd,* March 4, 1996. Upon further review, it appears that the IFQ regulations do not necessarily require this result. I do not reconsider our position in this appeal, however, because I conclude that the Appellant's claim was timely made.

information has adopted it and has abandoned any claims to the contrary. In addition, the Division views different types of data on an application as constituting distinct and separate types of claims. For example, the Division considers a claim of vessel ownership or of a vessel lease as entirely distinguishable and separate from a claim for qualifying pounds.

In the present case, the Appellant submitted an application for halibut QS in which he claimed a vessel lease of the F/V TRASK for the period March 15, 1984, through March 15, 1992. The Division had not supplied any data on Part 3 of the application relating to the Appellant's landings, nor did the Appellant fill in this information. The Division subsequently approved the lease claim, but did not ask the Appellant to make an affirmative claim of landings. Instead, the Division prepared a QSDS showing the landings for which the Appellant would receive credit, based on the data in the Official Record. The only landings for which the Appellant was eligible were the landings made from the F/V TRASK during the period of the lease. The QSDS was sent to the Appellant in early October 1994, and he was given until January 6, 1995, to respond. Meanwhile, the Division issued halibut QS to him in December 1994.

Within the appeal period following issuance of the QS, but after the January 6, 1995, response deadline, the Appellant submitted a written request to the Division to receive credit for an additional landing which was made from the F/V TRASK during the period of his lease. Although there was a record of this landing in the NMFS/RAM Official Database, the Division considered this a new claim and denied it as untimely.

The Division takes too narrow a view of what constitutes a claim, for purposes of deciding whether the claim has been timely made. Claims should be broadly construed in order to supply the meaning intended by the applicant and to serve the ends of justice. In this case, the Appellant did not explicitly claim a particular number of pounds on his application. His failure to object to the data presented on the QSDS within the 90-day response period need not be read as acquiescence in or adoption of that data as his claim. Rather, the data on the QSDS should be seen only as the amount that the Division was willing to credit to the Appellant in lieu of an explicit, affirmative claim for pounds. In the absence of an explicit claim of pounds, it is reasonable to conclude that the Appellant's claim of a vessel lease necessarily implies a request to receive all the legal landings made from the vessel during the period of the lease. Why would he not ask for or expect to receive credit for all such landings? When in doubt, the Division should presume that an applicant would want to receive the maximum amount of QS for which he or she qualifies.[9]

The Division's view that a claim of a vessel lease or ownership is entirely separate from a claim of pounds ignores the fact that the two are interrelated. One cannot receive an initial issuance of QS

[9]The Division already makes such a presumption with all applicants when it automatically credits their best five years of landings history from the qualifying and base years.

without having both ownership/lease and landings. An applicant who claims to have owned or leased a vessel is implicitly claiming all the legal landings from the vessel during the period of that ownership or lease. Conversely, an applicant who makes a claim of pounds is implicitly claiming to have owned or leased the vessel from which the fish were landed. By treating these as separate and unrelated claims, the Division needlessly imposes a technical requirement that frustrates the intent of applicants. Requiring applicants to make every aspect of their claims explicit, instead of making beneficial presumptions on their behalf, makes no allowance for errors or excusable neglect by an applicant, and punishes applicants for failing to state the obvious. This approach runs counter to the Division's usual efforts to provide the assistance and service necessary to ensure that qualified persons receive all the QS to which they are entitled.

Admittedly, the Division could not give credit for the landing in question because of the deficiency in the fish ticket and, therefore, acted properly in not including it in the Official Record. But by refusing to recognize that the Appellant's lease claim implied his claim for this landing, and by characterizing it as "new" and "untimely," the Division attempted to deny the Appellant the opportunity to have his claim considered on the merits by this Office or by the Division, even though he raised the issue in a timely fashion after the issuance of his QS.

It is unnecessary to find that the Division erred or was in any way at fault for not recognizing the additional pounds as part of the Appellant's original claim at the time QS was issued. It is sufficient to find that, in retrospect, this claim for the landing in question can be fairly construed as part of the Appellant's original claim and, therefore, was timely made. The Appellant's failure to object to the exclusion of this landing by the 90-day QSDS response deadline does not constitute a waiver of his right to appeal the amount of QS that was issued. His objection was raised during the appeal period following issuance of the QS and, therefore, can be reviewed on appeal. Normally, having found that the claim was timely made, the matter would be remanded to the Division for a determination on the merits. In this instance, however, the Division is without authority to consider the evidence of the landing because the fish ticket does not meet the requirements of 50 C.F.R. § 679.40(a)(3)(v) [formerly § 676.20(a)(1)(v)]. Therefore, it was necessary for the claim to be decided on the merits for the first time during the appeal.

3. Whether the Decision would result in a denial of due process to similarly situated applicants.

In its Request for Reconsideration, the Division asserts that the Decision, if left unchanged, will yield a distressing precedent because it will restrict applicants' due process protections. The Division states that the Decision would deny other, similarly situated applicants "the opportunity to review the relevant contents of the Official Record, and a reasonable time to make and support contrary claims . . ." and would "truncate opportunities for applicants to perfect their claims and to have them reviewed by

competent program personnel before a determination is made. Further, it invites appeals of matters that, in many cases, could have been determined at the Division level." [Motion, at 9]

The Division appears to be assuming that by allowing applicants to make "new" claims after QS has been issued, and by reviewing such claims on appeal, this Office would be both denying applicants their due process rights and usurping the role of the Division in making initial determinations on applicants' claims.

The Division's concerns and fears are unfounded, for several reasons. First, the Decision in this appeal found that the Appellant's claim was not "new" and "untimely," but part of his timely claim. The Division's determination that a claim is untimely must be reviewable on appeal. Otherwise, the right to an appeal is meaningless. The irony of the Division's assertion is that the Division itself denied the Appellant the opportunity to have his claim "reviewed by competent program personnel [i.e., Division staff] before a determination is made."

Second, as stated earlier, if this Office finds that a claim was timely made, the matter normally would be remanded to the Division for consideration and a determination on the merits. In this instance, however, that would be a pointless exercise because the Division cannot correct the defect in the fish ticket or consider it as evidence of a landing. The IAD stated as much when it explained to the Appellant why it could not include the landing in the computation of his total qualifying pounds.

Finally, contrary to the Division's assertion, an appellant *is* given "the opportunity to review the relevant contents of the Official Record, and a reasonable time to make and support contrary claims" during the course of the appeal. Appellants are entitled to see and obtain copies of their file and other relevant records of the Division, and are given adequate time to present their appeal to this Office. Therefore, the Decision will not result in a denial of due process to similarly situated applicants.

FINDINGS OF FACT

1. The landing in question was made on August 26, 1987, in the amount of 50,525 pounds of halibut.

2. The fish ticket that evidenced the landing in question did not indicate the gear type.

3. The Appellant did not explicitly claim a particular number of pounds on his application.

4. The Appellant's claim of a vessel lease necessarily implied a request to receive all the legal landings made from the vessel during the period of the lease.

CONCLUSIONS OF LAW

1. A deficient fish ticket that lacks an essential piece of information required under the IFQ regulations cannot be considered by the Division as evidence of a legal landing.

2. The Division did not have the legal authority to credit Appellant's landing.

3. It was not an error to exclude Appellant's fish ticket from the Official Record.

4. The requirement of submitting an application in order to obtain quota shares is implicit in the provisions of the IFQ regulations.

5. Whether a claim received by the Division after the 90-day response deadline was timely made depends on whether it was, or can be considered to have been, part of the applicant's original (timely) claim.

6. Claims for QS should be broadly construed in order to supply the meaning intended by the applicant and to serve the ends of justice.

7. When in doubt, the Division should presume that an applicant would want to receive the maximum amount of QS for which he or she qualifies.

8. The Division's determination that a claim is untimely must be reviewable on appeal.

9. The Decision in this appeal will not result in a denial of due process to similarly situated applicants.

DISPOSITION AND ORDER

The Division's Initial Administrative Determination, dated July 5, 1995, which denied the Appellant's claim to additional qualifying pounds of halibut in regulatory area 4A is VACATED. The April 5, 1996, Decision in this appeal is AFFIRMED and incorporated by reference to the extent that it is not inconsistent with this Decision on Reconsideration. The Division is ORDERED to allocate 50,525 qualifying pounds of halibut for regulatory area 4A to the Appellant and to issue the resulting QS and Individual Fishing Quota [IFQ] for 1997. This Decision on Reconsideration takes effect March 10, 1997, unless by that date the Regional Administrator orders review.

Because the Appellant still has an opportunity to receive QS and the corresponding IFQ for the 1997 fishing season, I recommend that the Regional Administrator expedite review of this Decision on Reconsideration and, if there is no substantial disagreement with it, promptly affirm it and thereby give it an immediate effective date.

Edward H. Hein
Chief Appeals Officer