

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 95-0140
)	
IOIL T. MARTISHEV,)	DECISION
Appellant)	
_____)	February 21, 1997

STATEMENT OF THE CASE

Appellant Ioil T. Martishev filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on September 12, 1995. The IAD denied Appellant's claims for additional halibut quota share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program on grounds that the claims, or evidence in support of them, were untimely. Appellant's interests are directly and adversely affected by the IAD. No hearing was held because there are no factual issues in dispute. The record was closed on April 19, 1996.

ISSUES

1. Whether Appellant's claim regarding dates of ownership of the F/V EXPRESS was timely made.
2. Whether Appellant should receive credit for halibut landings from the F/V EXPRESS for 1989 and 1990.
3. Whether Appellant's claim regarding dates of ownership of the F/V FAZAN was timely made, and whether Appellant should receive credit for halibut landings from the F/V FAZAN for 1987.

SUMMARY

Ioil Martishev wants credit for more halibut landings. He wants one additional year (1987) of landings from the F/V FAZAN, and two additional years (1989-1990) from the F/V EXPRESS. He has proven that he owned both boats during the respective years by submitting abstracts of title. The Division denied these claims, either because the claims or evidence in support of them were not submitted until after the response deadline set by the Division. We find that both claims were timely made, and conclude that the Appellant should receive credit for all legal halibut landings made from the vessels during the years in question.

BACKGROUND AND DISCUSSION

1. Whether Appellant's claim regarding dates of ownership of the F/V EXPRESS was timely made.

On his Request for Application [RFA] form, Appellant claimed ownership of the F/V EXPRESS through "spring 1991." He didn't indicate how long he had owned the boat. The Division sent him an Application showing his ownership dates as only March 1988 - Dec. 1988. These dates were based on the vessel registration [license] records that the Division had obtained from the Alaska Commercial Fisheries Entry Commission [CFEC]. Appellant signed the Application in June 1994, without noticing the discrepancy and without writing in the correct ownership dates. The Division sent the Appellant a letter in September telling him he had 90 days [until December 12, 1994] to make a claim for landings. Because he was out of the country in December, the Appellant [through his attorney] asked for an extension of the deadline for submitting documents "regarding his halibut and black cod catch from 1984 to 1990." The Division extended the deadline until March 6, 1995. The Division issued QS to the Appellant on January 31, 1995, based on his nine months' of ownership in 1988.

Within the appeal period following issuance of the QS, Appellant notified the Division that he did not receive credit for all the landings to which he thought he was entitled. Appellant later submitted a U.S. Coast Guard abstract of title showing that he had owned the F/V EXPRESS from the time it was built in 1988 until he sold it on January 5, 1991. The Division denied the Appellant's request for the additional landings. It is not clear from the IAD whether the reason for the denial was that the *evidence* in support of the Appellant's claims was submitted late, or whether the *claims* themselves were untimely. The IAD states both grounds.¹

On appeal, we can consider evidence that was not considered by the Division, as long as the underlying

¹On page 1 of the IAD, the Division Chief states that "your application for additional QS, premised upon your claim of different ownership dates for the F/V FAZAN and the F/V EXPRESS, was not presented to the Division in a timely manner . . ." But on page 5, the chief states: "The evidence you have provided in support of your claims is not timely-filed. For that reason, the RAM Division lacks authority to consider it. . . . If you had provided the Abstracts of Title in a timely manner (i.e., before the Quota Share Pools were established on January 31, 1995), it is possible that the Division could have amended the Official Record, allocated additional qualifying pounds, and awarded additional QS prior to the 1995 season."

claim was made before the Appellant's response deadline.² In Tiger, Inc.,³ we said that information on an RFA is part of an applicant's claim, and that the claim is deemed to have been timely made if the RFA was filed in a timely manner. In the present case, the Appellant timely filed his RFA, and the RFA included his claim that he owned the F/V EXPRESS until 1991. Since the Division knew that the Appellant owned the vessel in 1988, we view his claim on the RFA as including the claim of ownership for 1989 and 1990. Appellant did not abandon this claim when he signed the application, which showed ownership only for 1988.

In Tiger, Inc.,⁴ we stated:

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.

Thus, we find that the Appellant's claim that he owned the F/V EXPRESS in 1989 and 1990 was timely made, and evidence relating to that claim may be considered on appeal.

2. Whether Appellant should receive credit for halibut landings from the F/V EXPRESS for 1989 and 1990.

As the program has been implemented by the Division, a qualified person may receive credit only for landings that were made from a vessel owned or leased by the applicant at the time of the landings. Evidence of vessel ownership is limited to three types of documents, in order of priority: a U.S. Coast Guard abstract of title, a certificate of registration that is determinative of vessel ownership, and a bill of sale.⁵ The best evidence of vessel ownership, if it exists, is a Coast Guard abstract of title. Absent any evidence that an abstract of title is erroneous or fraudulent, NMFS is required to accept that document

²Upon further review, it appears that the IFQ regulations do not necessarily require that a claim be made before the Division's response deadline in order for the claim to be considered on appeal. We do not reconsider our position on this point in this appeal, however, because we conclude that the Appellant's claims were timely made.

³Tiger, Inc., Appeal No. 95-0100, November 17, 1995, *aff'd on reconsideration*, February 26, 1996, *aff'd*, March 4, 1996.

⁴Decision on Reconsideration, at 8.

⁵*See* 50 C.F.R. § 679.40(a)(3)(ii), formerly 50 C.F.R. § 676.20(a)(1)(ii).

as proof of ownership.⁶

We find that the Coast Guard abstract of title for the F/V EXPRESS establishes that the Appellant owned the vessel during all of 1989 and 1990. Therefore, we conclude that the Appellant is entitled to credit for all legal landings made from the F/V EXPRESS during 1989 and 1990.⁷

3. Whether Appellant's claim regarding dates of ownership of the F/V FAZAN was timely made, and whether Appellant should receive credit for halibut landings from the F/V FAZAN for 1987.

The Appellant's claim to an additional year of ownership of the F/V FAZAN, and credit for the halibut landings made from the vessel during that year, is a little more complicated than his claim relating to the F/V EXPRESS. Appellant did not mention the F/V FAZAN on his RFA. The Division listed the Appellant as owner of the vessel on his application for the period December 1983 through December 1986. These dates were based on vessel registration data that the Division obtained from the CFEC. It turns out that these dates are incorrect, and that the Appellant did own the vessel through 1987. A Coast Guard abstract of title shows that the Appellant was the owner in 1987. CFEC's own records also show that the Appellant was the registered owner under a two-year license for 1986 and 1987. The Division's records, however, did not show who owned the F/V FAZAN in 1987.

As with his other vessel, the Appellant did not correct the dates of ownership for the F/V FAZAN on his application. He did, however, submit a CFEC data sheet of his landings from both the F/V FAZAN and the F/V EXPRESS for the period 1984 through 1990. The data sheet clearly shows that the Appellant made halibut landings from the F/V FAZAN in 1987. The Division viewed the data sheet as evidence of landings, but did not accept it as a claim of vessel ownership. In the IAD, the Division Chief stated: "The CFEC data sheet displayed landings that were attributed to your CFEC permit card; it does not explain who owned the vessel(s) upon which such vessels (sic) were made." [IAD, at 4, f.n. 1]

⁶Prowler Partnership v. Samuelson, Appeal No. 95-0084, November 8, 1995, at 5; incorporated by reference in Prowler Partnership v. Samuelson, Decision on Reconsideration, March 12, 1996; *aff'd* March 14, 1996; *appeal pending*, Prowler Partnership v. National Marine Fisheries Service, Case No. A96126CIV (D.C. Alaska, complaint filed April 10, 1996).

⁷The Division credited the 1990 halibut landings from the F/V EXPRESS to a Mr. Andrey Kaya because he was listed in the Official NMFS IFQ Record as the registered owner of the vessel that year. The resulting QS that was issued to Mr. Kaya for those landings has been transferred to a third party. Because the Division does not seek to revoke QS transferred to an innocent third party, Mr. Kaya has nothing at stake in this appeal and, therefore, he was not made a party to the appeal.

We believe that the Division's reading of the data sheet is too restrictive. The data sheet can reasonably be construed not only as a claim for the 1987 landings, but also as a claim to have owned or leased the vessel from which those landings were made. As we stated recently in the Adamonis decision:⁸

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 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.

We also stated that "Claims should be broadly construed in order to supply the meaning intended by the applicant and to serve the ends of justice."⁹

The next question is whether this claim was timely made, because the IAD concluded that it was not. We conclude that the claim *was* timely made. As we discuss below, the evidence in the record persuades us that the Appellant submitted the CFEC data sheet to the Division on December 13, 1994, which was within the [extended] response period set by the Division.

The IAD mentions this data sheet in connection with a letter received by the Division on March 13, 1995, from Roseleen Moore of Northern Enterprises, Inc., on the Appellant's behalf. This is the letter in which the Appellant notified the Division that he did not receive all the QS to which he thought he was entitled. The Division Chief points out that this letter [and the CFEC data sheet] was received "a full week following the evidentiary deadline" and, therefore, concludes that the Appellant's *claim to ownership of the F/V FAZAN for 1987* was untimely. [IAD, at 4 and 1] Ms. Moore states in her letter, however, that her office had Stewart Rickey hand-deliver the CFEC data sheet to the Division in December 1994. Mr. Rickey has provided a photocopy of his log book entry [Exhibit 1], which showed that he hand-delivered the data sheet to the Division on December 13, 1994. The data sheet

⁸Charles A. Adamonis, Decision on Reconsideration, Appeal No. 95-0133, February 7, 1997, at 6.

⁹*Id.*

itself is dated December 12, 1994. There is no date stamp on the document to show when it was received by the Division, but we find by a preponderance of the evidence that it was delivered to the Division on December 13, 1994. Because we construe the CFEC data sheet as implicitly including a claim of ownership of the F/V FAZAN for 1987, and because the document was delivered to the Division before the [extended] evidentiary deadline, we conclude that this vessel ownership claim was timely made.

Because the Coast Guard abstract of title establishes that the Appellant owned the F/V FAZAN in 1987, and because no one else claims to have owned or leased the vessel that year, we conclude that the Appellant should receive credit for all legal landings of halibut from the vessel during 1987.

FINDINGS OF FACT

1. Appellant's assertion in his RFA that he owned the F/V EXPRESS until the spring of 1991 was part of his Application and claim.
2. Appellant did not waive his claim that he owned the F/V EXPRESS in 1989 and 1990 when he signed his Application without changing the ownership dates.
3. The Appellant was the owner of the F/V EXPRESS from the time it was built in 1988 until it was sold in January 5, 1991.
4. A copy of a CFEC data sheet, showing Appellant's halibut landings from 1984-1990, was hand-delivered to the Division by Stewart Rickey on December 13, 1994, .
5. The CFEC data sheet represented Appellant's claim of total qualifying pounds of halibut landings made from the F/V FAZAN, and his claim ownership of the vessel in 1987.
6. The Appellant was the owner of the F/V FAZAN from March 1983 until December 30, 1987.

CONCLUSIONS OF LAW

1. Appellant's claims regarding dates of ownership of the F/V FAZAN and the F/V EXPRESS were timely made and can be considered on appeal.
2. The Appellant should receive credit for halibut landings from the F/V FAZAN for 1987 and from the F/V EXPRESS for 1989 and 1990.

DISPOSITION AND ORDER

The Division's IAD that denied Appellant's application for additional halibut QS is VACATED. The Division is ORDERED to amend the NMFS Official IFQ Record to reflect that the Appellant was the owner of the F/V EXPRESS from 1988 until January 5, 1991, and the owner of the F/V FAZAN from March 1983 through December 30, 1987, and to process Appellant's Application for QS on that basis.¹⁰ This Decision takes effect on March 24, 1997, 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 4:30 p.m. Alaska Standard Time, on the tenth day after the date of this Decision, March 3, 1997. 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. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

Edward H. Hein
Chief Appeals Officer

Randall J. Moen
Appeals Officer

¹⁰In Charles A. Adamonis, Decision on Reconsideration, Appeal No. 95-0133, February 7, 1997, we stated that "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." This was an error. Issues raised on appeal will be decided by this Office unless the Appellant or Respondent would be unduly prejudiced by not remanding to the Division for another determination.