NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

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| In re Application of | ) | Appeal No. 96-0002 |
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| THOMAS W. MITTENEN, | ) | DECISION ON RECONSIDERATION |
| Appellant | ) | |
| _____ | ) | September 16, 1999 |

A Decision was issued in this appeal on January 22, 1999. In the Decision, we ruled that Mr. Mittenen is entitled to halibut quota share [QS], based on his "equitable" ownership of the F/V MARGARET G in 1989, and on his ownership of the F/V MASONIC in 1984 (via Wesfisco, Inc.).

On February 8, 1999, Mr. Mittenen filed a timely motion for reconsideration. The standard for reconsideration is whether the requesting party has raised a material matter of fact or law that the Appeals Officer has overlooked or misunderstood.

Mr. Mittenen claims on reconsideration that we failed to consider material evidence and applicable law that shows he leased the F/V MARGARET G in 1988, and that legal landings of halibut and sablefish were made from the vessel during that year. Specifically, Mr. Mittenen claims that we overlooked:

> (1) material evidence and law that shows Mr. Hofmann's affidavit is conclusive evidence of Mr. Mittenen's lease of the F/V MARGARET G in 1988;
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> (2) applicable law that shows an Alaska Department of Fish and Game [ADF&G] intent to operate was not required for the F/V MARGARET G in 1988;
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> (3) an Alaska state fish ticket that shows halibut was landed from the F/V MARGARET G on May 25, 1988;
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> (4) applicable law that shows the state fish tickets for the F/V MARGARET G in 1988 are evidence of legal sablefish landings; and
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> (5) material law and evidence that allows Mr. Mittenen's claim of the lease of the F/V SALTY III in 1987 and the lease of the F/V PARAGON in 1990 to be considered on appeal.

Because I conclude on reconsideration that no legal landings of halibut or sablefish were made from the F/V MARGARET G in 1988, it is not necessary to address whether we overlooked material evidence or law that shows Mr. Mittenen leased the vessel in 1988. Thus, there is no need to consider whether we overlooked material evidence and law that shows Mr. Hofmann's affidavit is conclusive evidence of

the lease of the F/V MARGARET G in 1988.

**1. Did we overlook applicable law that shows an ADF&G intent to operate was not required for the F/V MARGARET G in 1988?**

Mr. Mittenen claims that the state of Alaska did not have the legal authority to require the F/V MARGARET G to have an ADF&G intent to operate. Mr. Mittenen alleges that the ADF&G intent to operate was only required for vessels operating in state waters, and that requiring an ADF&G intent to operate in this case violates "principles of federal supremacy" under the U.S. Constitution, and the policies of the state of Alaska.

The owner of the F/V MARGARET G, Cruzan Fisheries, Inc., pled "no contest," and was found guilty and fined by a district court of the state of Alaska, for not having filed an ADF&G intent to operate during the harvest of the fish landed from the F/V MARGARET G in 1988. Cruzan Fisheries, Inc.'s plea and conviction shows that Cruzan Fisheries, Inc. conceded that the state had authority to require an ADF&G intent to operate for the vessel. Mr. Mittenen cannot now claim otherwise on reconsideration, and be issued IFQ credit for illegally harvested and processed fish, as the operator or lessee of the vessel.[1]

Mr. Mittenen claims, in the alternative, that even if the ADF&G intent to operate was required, that we misapplied Weber v. Kochuten[2] in concluding that the ADF&G intent to operate was the kind of state regulation that had to be complied with in order for him to receive credit for a legal landing under the IFQ program. Mr. Mittenen is incorrect. The state regulation is not just a "paperwork" regulation, but a legal requirement for QS. The state regulation clearly relates to the commercial harvest and processing of fish in and off Alaska. Therefore, the ADF&G intent to operate was the kind of state regulation that had to be complied with in order for legal landings to be made from the vessel.

In sum, the Decision did not overlook applicable law regarding whether or not an ADF&G intent to operate was required for the F/V MARGARET G in 1988.

**2. Did we overlook a state fish ticket that shows halibut was landed from the F/V MARGARET G on May 25, 1988?**

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[1]In several cases, we have ruled that issuance of QS cannot be based on a "legal landing" of illegally harvested fish. *See, e.g,* Prowler Partnership v. Gainhart Samuelson, Appeal No. 95-0084, Decision on Reconsideration (Part II), September 29, 1997.

[2]Appeal No. 95-0122, June 18, 1996.

Mr. Mittenen correctly points out on reconsideration that we overlooked a state fish ticket which shows a halibut landing was made from the F/V MARGARET G by Mr. David Dowie on May 25, 1988. The fish ticket is complete and was timely submitted to the state of Alaska, and on its face, meets all of the state regulatory requirements for the submission of a state fish ticket. Even so, Mr. Mittenen cannot receive IFQ credit for the landing since the halibut was not legally landed because the vessel did not have an ADF&G intent to operate at the time of harvest and landing of the fish.

**3. Did we overlook applicable law that shows the state fish tickets for the F/V MARGARET G in 1988 can be used as evidence of legal sablefish landings?**

In the Decision, we concluded that the state fish tickets for the sablefish landings from the F/V MARGARET G in 1988 were not legally sufficient or credible evidence of legal landings, either because the information in the state fish tickets was incomplete or because the state fish tickets were untimely filed.

**a. Can the missing information on the state fish tickets for the sablefish landings be cured by "other evidence"?**

Mr. Mittenen claims that he should have been allowed to use "other evidence" on appeal to cure the deficiencies in the state fish tickets for the sablefish landings of the F/V MARGARET G in 1988. Mr. Mittenen cites various IFQ cases, in which we allowed "other evidence" on appeal to cure the "stat area" [Dexter, and S.Y.B. Fisheries], the gear type [Adamonis], and the vessel name [Merritt], on a state fish ticket, so that the fish ticket could be used as evidence of a legal landing.

On reconsideration, an Appeals Officer can only consider evidence *in the record* that was overlooked on appeal. In this case, Mr. Mittenen did not produce "other evidence" to cure the deficiencies in the state fish tickets until January 11, 1999, weeks after the close of the record on appeal (December 21, 1998).[3] Therefore, I do not have the authority to consider Mr. Mittenen's "other evidence" on reconsideration. Even if I could consider the "other evidence," I would still conclude that the "other evidence" is insufficient to cure the deficiencies in the state fish tickets.

In the cases cited by Mr. Mittenen, the "other evidence" was used to correct inadvertent errors or omissions in state fish tickets[4] that had been prepared at the time of the landing of the fish. In this case,

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[3] *See*, the fax from Mr. John Gissberg to Randall Moen, January 11, 1999, for a description of the "other evidence."

[4] *See*, Leonard Leach, Appeal No. 95-0115, Decision on Review, August 31, 1998, in which the regional administrator of NMFS ruled that evidence of a legal landing is limited to the information on state

only one[5] of the four state fish tickets for the sablefish landings from the F/ V MARGARET G in 1988 was prepared at the time of the landing of the fish; and none of the state fish tickets are cured by the "other evidence." As stated in the Decision, the "other evidence" is insufficient evidence of legal landings because it fails to provide the date and location of the harvest of the fish, the actual weight of the fish at the time of landing, and proof that the fish were caught and landed from the F/V MARGARET G.

**b. Are the state fish tickets for the sablefish and halibut landings in 1988 evidence of legal landings for IFQ purposes because the fish tickets were accepted by ADF&G and the International Pacific Halibut Commission [IPHC]?**

Mr. Mittenen argues that the state fish tickets for the F/V MARGARET G in 1988 should be considered evidence of legal landings for IFQ purposes because the fish tickets were accepted by ADF&G and the IPHC. Mr. Mittenen specifically cites Adamonis[6] in which we stated that the IPHC "would not have included an illegal landing in the data provided to the state of Alaska."

In Adamonis, we accepted the fish ticket as evidence of a legal landing because we were satisfied that the IPHC had verified the missing information on the state fish ticket. In Mr. Mittenen's case, it was evident to us that the missing information on the state fish tickets had not been verified by ADF&G. In neither case did we allow the IPHC or ADF&G to determine whether the evidence on the state fish ticket was evidence of a legal landing. In fact, we have never concluded in any IFQ case that "acceptance" of a state fish ticket *by another governmental agency* is evidence of a "legal landing" for purposes of IFQ. This agency must make the final decision as to whether a state fish ticket satisfies the requirements of a "legal landing" under the regulations of the IFQ program. Therefore, acceptance of the state fish tickets in this case by ADF&G and IPHC is not evidence of legal landings.

**c. Were the landings of halibut and sablefish from the F/V MARGARET made "legal" with Cruzan Fisheries, Inc.'s payment of fines for violations relating to the ADF&G intent to operate?**

Mr. Mittenen cites no legal authority for determining that payment of fines is evidence of a legal landing of sablefish or halibut for IFQ purposes. If anything, the payment of fines for violation of state or federal law is evidence that the landing of the fish is not a "legal landing" for purposes of IFQ. A

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fish tickets [or federal catch reports] prepared at the time of the landing of the fish.

[5]*See*, the state fish ticket for the May 3, 1988, sablefish landing.

[6]Appeal No. 95-0133, April 5, 1996.

landing of halibut and sablefish must be made in compliance with state and federal regulations.

In sum, I conclude that the state fish tickets for the sablefish landings from the F/V MARGARET G in 1988 cannot be cured by "other evidence," by ADF&G's and the IPHC's acceptance of the fish tickets, or by Mr. Hofmann's (Cruzan Fisheries) payment of fines. Even if the deficiencies in the state fish tickets could have been cured, Mr. Mittenen still could not receive IFQ credit for the landings because the F/V MARGARET G did not have a valid ADF&G intent to operate at the time the fish were harvested from the vessel.

**4. Did we overlook material law and evidence that allows Mr. Mittenen's claim of the lease of the F/V SALTY III in 1987 and the lease of the F/V PARAGON in 1990 to be considered on appeal?**

Mr. Mittenen claims that we overlooked material law and evidence that allows him to prove on appeal that he leased the F/V SALTY III in 1987 and the F/V PARAGON in 1990.

We did not allow Mr. Mittenen to produce evidence on appeal in support of his claim that he leased the F/V SALTY III and the F/V PARAGON because we concluded that he had not timely claimed the lease of the vessels on his RFA or application for QS. He did not mention anything about the lease of these two vessels until after he filed an appeal in this case. He did not file an application for QS, and on his RFA he claimed only that he leased the F/V MARGARET G in 1988 and that he owned the F/V MASONIC in 1984 (via his interest in Wesfisco, Inc.).

Mr. Mittenen cites Adamonis[7] as legal authority to show that he made a timely claim of the lease of the F/V SALTY III and the F/V PARAGON. In Adamonis,[8] we ruled that "Claims should be broadly construed in order to supply the meaning intended by the applicant and to serve the ends of justice." In articulating that standard, we were protecting the applicant's expectation, based on a "fair reading" of the applicant's RFA or application for QS.[9] The standard used in Adamonis cannot be used to grant Mr. Mittenen relief in this case because his claim of the lease of the above two vessels cannot be fairly construed as part of his original claim in his RFA.

Mr. Mittenen argues, nonetheless, that we overlooked material evidence that shows he was not given an opportunity to claim on his application for QS that he leased the vessels. He points to evidence in

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[7]Appeal No. 95-0133, April 5, 1996.

[8]Appeal No. 95-0133, Decision on Reconsideration, February 7, 1997, at 6.

[9]Id., at 7.

the record that shows RAM sent him an application for QS on two separate occasions via certified mail, but that he never received the applications because he was fishing out of state during the time of mail delivery. Based on that evidence, it is obvious that RAM did not prevent Mr. Mittenen from claiming that he leased the F/V SALTY III and the F/V PARAGON on his application for QS. RAM gave Mr. Mittenen an opportunity to make that claim when it sent him an RFA and two applications for QS. It was Mr. Mittenen's responsibility to see to it that his mail was forwarded to him. Mr. Mittenen's failure to pick up his mail within a reasonable period is not an appropriate basis for allowing him to prove a new claim on appeal.

I conclude that the Decision did not overlook material evidence or law that allows Mr. Mittenen's claim of the lease of the F/V SALTY III in 1987 and the lease of the F/V PARAGON in 1990 to be considered on appeal.

**CONCLUSION**

I conclude on reconsideration that the Decision did not overlook material evidence or law that would allow Mr. Mittenen to receive IFQ credit for legal landings of halibut or sablefish from the F/V MARGARET G in 1988.

FINDINGS OF FACT

1. Cruzan Fisheries, Inc.'s plea and conviction in the District Court of the State of Alaska shows that Cruzan Fisheries, Inc. conceded to the state of Alaska's authority to require an ADF&G intent to operate for the F/V MARGARET G in 1988.

2. In the Decision, we overlooked an Alaska state fish ticket, which shows a halibut landing was made from the F/V MARGARET G on May 25, 1988.

3. The "other evidence" produced by Mr. Mittenen, to cure deficiencies in the state fish tickets for sablefish landings from the F/V MARGARET G in 1988, was not produced until after the close of the record on appeal.

4. We have never concluded in any IFQ case that "acceptance" of a state fish ticket by another governmental agency is evidence of a legal landing for purposes of IFQ.

CONCLUSIONS OF LAW

1. There is no need to address on reconsideration whether the Decision overlooked material evidence and law that shows Mr. Hofman's affidavit is conclusive evidence of the lease of the F/V MARGARET G in 1998 because no legal landings of halibut or sablefish were made from the vessel during that year.

2. Mr. Mittenen cannot claim on reconsideration that the state of Alaska did not have authority to require an ADF&G intent to operate for the F/V MARGARET G in 1988 because the owner of the vessel, Cruzan Fisheries, Inc., conceded to the state's authority when it pled "no contest" and was convicted by the District Court of the State of Alaska for not having an ADF&G intent to operate for the vessel during that year.

3. As the operator of the F/V MARGARET G in 1988, Mr. Mittenen cannot be issued IFQ for illegally harvested and processed fish.

4. The state regulation requiring an ADF&G intent to operate was the kind of state regulation that had to be complied with in order for legal landings to be made from the F/V MARGARET G in 1988.

5. Even though we overlooked an Alaska state fish ticket, which shows a halibut landing was made from the F/V MARGARET G on May 25, 1988, Mr. Mittenen cannot receive IFQ credit for the landing because the vessel did not have a valid ADF&G intent to operate at the time of the harvest and landing of the fish.

6. The Office of Administrative Appeals cannot consider on reconsideration Mr. Mittenen's "other evidence" to cure deficiencies in the state fish tickets for the sablefish landings from the F/V MARGARET G in 1988 because the "other evidence" was not produced until after the close of the record on appeal.

7. Even if Mr. Mittenen's "other evidence" could be considered on reconsideration, the "other evidence" would not be sufficient to cure the missing information in the state fish tickets for the sablefish landings from the F/V MARGARET G in 1988,

8. Even if all of the deficiencies in the state fish tickets could have been cured by "other evidence," Mr. Mittenen still could not receive IFQ credit for the landings under the state fish tickets because the F/V MARGARET G did not have a valid ADF&G intent to operate at the time the fish were harvested from the vessel.

9. The acceptance of the state fish tickets for halibut and sablefish landings from the F/V MARGARET G in 1988 by ADF&G and the IPHC is not evidence of legal landings from the vessel.

10. This agency must make the final decision as to whether a state fish ticket satisfies the requirements

of a "legal landing" under the IFQ program.

11. The payment of a fine for a violation of a state or federal regulation is not evidence of a legal landing for purposes of IFQ.

12. Mr. Mittenen's original RFA cannot be reasonably construed as a claim for the lease of the F/V SALTY III or the lease of the F/V PARAGON.

13. Mr. Mittenen was given a reasonable opportunity to claim in his original application that he leased the F/V SALTY III and the F/V PARAGON.

14. The Decision did not overlook material evidence or law that would allow Mr. Mittenen to receive IFQ credit for legal landings of halibut or sablefish from the F/V MARGARET G in 1988.

## DISPOSITION

The Decision in this Appeal is AFFIRMED. This Decision on Reconsideration incorporates the Decision by reference, and it takes effect on October 16, 1999, unless by that date the Regional Administrator orders review of the Decision on Reconsideration.

Randall J. Moen
Appeals Officer