

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 96-0004  
)  
DELBERT L. FERRIER, ) DECISION  
Appellant )  
\_\_\_\_\_ ) February 1, 1999

STATEMENT OF THE CASE

The Appellant, Delbert Ferrier, filed a timely appeal of an Initial Administrative Determination [IAD] issued on February 14, 1996, by the Restricted Access Management [RAM] program.<sup>1</sup> Mr. Ferrier's application for additional halibut quota share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program was denied on the grounds that the claimed landings were not supported by state fish ticket evidence, as required by IFQ regulations.

Mr. Ferrier has adequately shown his interests are directly and adversely affected by the IAD. Because the record contains sufficient information on which to reach a final decision, and because there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered. 50 C.F.R. § 679.43(g)(2) and (3).<sup>2</sup>

ISSUE

Can Mr. Ferrier receive IFQ credit for additional pounds of claimed halibut landings in the absence of state fish ticket evidence?

BACKGROUND

Mr. Ferrier, a "qualified person" who has received halibut QS, seeks IFQ credit for an additional estimated 32,800 qualifying pounds of halibut that he claims were offloaded from his vessel, the F/V DEMETRA M, to the F/V CELTIC AIRE, in the waters of Prince William Sound, Alaska, in May and August of 1984 and April, May, and September of 1985. Mr. Ferrier claims the fish were sold to a fish buyer, Mr. Willis Gormley, the skipper of the F/V CELTIC AIRE.

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<sup>1</sup>The Restricted Access Management Division was renamed Restricted Access Management program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

<sup>2</sup>Formerly 50 C.F.R. § 676.25(g)(2) and (3). All IFQ regulations were renumbered, effective July 1, 1996. See, 61 Fed. Reg. 31,270 (1996). The wording of the regulations in question was unchanged by the renumbering.

Mr. Ferrier did not produce any state fish tickets as evidence of these landings. He claims that his copies of the fish tickets were lost or destroyed. He does not account for what became of the other copies of the fish tickets that should have been retained by the IPHC, the State of Alaska, and the fish processor who purchased the fish.

Mr. Ferrier has submitted considerable other evidence of these landings, including:

# a videotape, taken by Mr. Willis Gormley, showing the delivery of halibut in 1985;

# the affidavits of two crew members [deckhands Greg Heuschkel and Ronald Shannon], who assert that they witnessed landings of approximately 8,000 pounds of halibut from the F/V DEMETRA M in 1984;

# the affidavits of W.F. Gormley, who says he purchased halibut from Mr. Ferrier in 1984 and 1985;

# the affidavit of Mr. Jesse Frank, who states that he observed the F/V DEMETRA M "low in the water" in 1984 (apparently with fish); and

# the affidavit of Mr. John Bosshard III, who states that he witnessed the transfer of halibut from the F/V DEMETRA M to the F/V CELTIC AIRE in 1984.

In its IAD, RAM denied Mr. Ferrier's claim because there were no fish tickets in the record to support the claim. RAM explained that it has no discretion to allocate qualifying pounds without fish ticket (or federal catch report) evidence required under 50 C.F.R. § 679.40(a)(3)(v)(B). RAM also pointed out that it is extremely difficult to "hypothecate" the number of pounds landed without contemporary catch documents, which is one reason the regulations require fish ticket evidence.

On appeal, Mr. Ferrier argues that he shouldn't be denied credit for landings just because he did not save copies of his fish tickets. He argues that it is unfair and unjust to ignore the other evidence he presented. He proposes that his average halibut catch for other years be used to arrive at a fair estimate of the number of pounds he landed in 1984 and 1985.

## DISCUSSION

Only legal landings may be credited for IFQ purposes. 50 C.F.R. § 679.40(a)(2) and (4). To be considered a "legal landing," the fish must have been harvested and landed in compliance with applicable state and federal regulations in effect at the time of the landing. 50 C.F.R. § 679.40(a)(3)(v)(A). At the time of the landings in question in this appeal (1984 and 1985), Alaska state regulations required each buyer of raw fish to prepare a state fish ticket for the landing of the fish and to submit the ticket to the state. 5 AAC 39.130(b). Thus, to be legally landed for IFQ purposes,

the landings claimed by Mr. Ferrier had to be reported on state fish tickets.

The only evidence in the record that fish tickets were prepared for the claimed landings is Mr. Ferrier's assertions that his copies of fish tickets for 1984 were destroyed or missing as a result of a fire aboard his vessel, and that he was unable to locate his fish tickets for 1985. Mr. Ferrier did not produce any of the fish tickets, nor has he explained why the State of Alaska does not have any record of these landings. This absence of fish ticket evidence strongly suggests that the landings were not properly reported to the government as required by regulations, and we so find. We, therefore, conclude that RAM properly denied Mr. Ferrier's claim, not only because of insufficient evidence of landings, but also because the landings were not legal landings under 50 C.F.R. § 679.40(a)(3)(v)(A) and cannot be credited for IFQ purposes..

In Jack C. Kvale,<sup>3</sup> we recognized the possibility that an appellant, having established that fish tickets or weekly 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. In this case, although Mr. Ferrier asserts that his copies of the fish tickets for these landings were destroyed or lost, he has failed to assert or establish that the fish tickets were ever properly completed and submitted to the government. Consequently, he cannot use his other evidence<sup>4</sup> to prove he made these additional halibut landings.

#### FINDING OF FACT

The halibut landings that Mr. Ferrier claims were made from the F/V DEMETRA M in 1984 and 1985 were not properly reported to the government as required by state regulations in effect at the time of the landings.

#### CONCLUSIONS OF LAW

1. Mr. Ferrier's other evidence cannot be used in this appeal in lieu of state fish tickets to prove he made legal landings of halibut and sablefish in 1984 and 1985.
2. The halibut landings that Mr. Ferrier claims were made from the F/V DEMETRA M in 1984 and 1985 were not legal landings under 50 C.F.R. § 679.40(a)(3)(v)(A).
3. Mr. Ferrier cannot receive IFQ credit for additional pounds of claimed halibut landings in the absence of state fish ticket evidence.

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<sup>3</sup>Appeal No. 95-0103, September 30, 1998, n. 8.

<sup>4</sup>We note that Mr. Ferrier's "other evidence" fails to show the actual, scaled weight of the halibut, and lacks independent and contemporaneous written verification of the harvest and landings of the fish.

4. RAM properly denied Mr. Ferrier's claim.

## DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on March 3, 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 February 11, 1999, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must specify one or more 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

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Edward H. Hein  
Chief Appeals Officer