NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 96-0009
	)	
YUKON QUEEN FISHERIES, LLP	)	DECISION
Appellant	)	
_____	)	September 17, 1998

STATEMENT OF THE CASE

Yukon Queen Fisheries, Limited Partnership, [Yukon] filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management [RAM] program on February 29, 1996. The IAD denied Yukon's application for a Vessel Moratorium Qualification [VMQ] and Permit [VMP] under the Vessel Moratorium on Groundfish and Crab [50 C.F.R. Part 679]. The application was denied on the grounds that Yukon was not the current owner of the F/V YUKON QUEEN, the vessel for which the qualification and permit were sought.

On appeal, Yukon requested an oral hearing "[t]o the extent that facts concerning the sale(s) of the Yukon Queen are disputed by anyone . . .." The facts in this appeal are undisputed, and the appeal involves only issues of law. Therefore, no hearing has been ordered. Yukon has adequately shown that its interest is directly and adversely affected by the IAD, as required by 50 C.F.R. § 679.43(b). [1]

ISSUE

Whether Yukon has retained the fishing history and vessel moratorium qualification for the F/V YUKON QUEEN; and, if so, whether Yukon should receive approval of its VMQ transfer (retention) and a transferrable vessel moratorium qualification certificate.

BACKGROUND

1. Yukon owned the F/V YUKON QUEEN from January 1988 until June 1994. This period covers the moratorium qualification period of January 1, 1988, through February 9, 1992.

2. RAM has determined that the vessel is qualified under the moratorium, as evidenced by its issuance of a transferrable VMQ to New Yukon Queen Limited Partnership [New Yukon], the current owner of the vessel.

3. SeaFirst National Bank [SeaFirst] held several preferred ship mortgages on the vessel. In September 1993, SeaFirst filed a complaint in U.S. District Court (Western District of Washington) to

foreclose on the mortgages. [Tab 1b, Appellant's Exhibit B]

4. In June 1994, the vessel was sold by the U.S. Marshal to SeaFirst.

5. In August 1994, SeaFirst obtained a deficiency judgment on the mortgages for more than $500,000.

6. In November 1994, after Yukon challenged entry of the deficiency judgment, the parties reached a tentative settlement. Notice of the tentative settlement was filed with the U.S. District Court on November 6, 1994. [Tab 1c] Yukon asserts that in the tentative settlement, the parties understood and agreed that SeaFirst had not obtained any fishing rights when it purchased the vessel in the U.S. Marshal's sale. Yukon asserts that, pursuant to the tentative settlement agreement, a Bill of Sale for fishing rights was prepared by its lawyers and sent to SeaFirst's lawyers, and that the Bill of Sale became part of the final Settlement Agreement.

7. On December 13, 1994, SeaFirst sold the F/V YUKON QUEEN to New Yukon Queen Limited Partnership. [Tab 1d]

8. In May and June 1995, Yukon and SeaFirst entered into a final Settlement Agreement to resolve the deficiency claim. In exchange for SeaFirst's agreement to amend the deficiency and other consideration, Yukon agreed to execute the Bill of Sale and Assignment of

> . . . all right, title and interest in and to all individual fishing quota rights and individual transferable quota rights, limited entry rights, and similar fishing quota rights, licenses, intangibles or privileges, however characterized, of any form whatsoever, whenever issued, under federal, state or local law, for harvesting and processing (including products) in all geographic areas, including without limitation, the Gulf of Alaska, Bering Sea and Pacific Ocean, that relates to: the YUKON QUEEN. . .

as well as all of Yukon's

> . . . right, title and interest in and to and benefit of all catch histories, landings records, fish tickets or other fishing records and histories of the Vessel in all Gulf of Alaska, Bering Sea and Pacific Ocean Groundfish Fisheries, federal and state hereof, of all gear types, for all periods up to and including the date or [sic] and applications, information and filings relating to the Vessel . . . . [Tab 2c, Appellant's Exhibit 3 to Settlement Agreement, at 1]

9. On August 2, 1995, a Bill of Sale and Assignment was executed by James E. Beaton, both individually and on behalf of Yukon. The Settlement Agreement provided that in the event of a default, Yukon and Mr. Beaton unconditionally agreed to convey and transfer all the specified fishing rights to SeaFirst. [Tab 2c, Settlement Agreement, at 9]

10. On August 2, 1995, pursuant to the Settlement Agreement, Yukon placed the Bill of Sale and Assignment of fishing rights in escrow with Kim Marine Documentation, Inc., of Seattle. The escrow instructions provided that Yukon and Mr. Beaton could use the fishing rights as long as they were not in default. In the event of notice of a default, the escrow agent would date the document and would fill in the name of the purchaser of the fishing rights. [Tab 28]

11. Also on August 2, 1995, Mr. Beaton (individually and as agent of Yukon Ventures, L.P. and Yukon Queen Fisheries, L.P.) granted a security interest to SeaFirst in which the fishing rights and other property were listed as collateral for the indebtedness to the bank. [Tab 29]

DISCUSSION

Under the Groundfish Moratorium regulations, a vessel moratorium permit [VMP] is to be issued to the current vessel owner at the time of application. 50 C.F.R. § 679.4(c)(6). [2] Strictly speaking, it is only the permit, and not the VMQ, for which current vessel ownership is required. The VMQ is severable from vessel ownership, but RAM (based on preamble language) presumes that the VMQ belongs to the current vessel owner unless otherwise specified in a purchase agreement or contract. [3] Because RAM had no evidence before it to rebut the presumption in this case, it concluded that New Yukon held the VMQ and that Yukon did not. On that basis, RAM issued the transferrable VMQ and a VMP for the F/V YUKON QUEEN to the current owner, New Yukon. RAM also issued a nontransferable VMQ and a VMP to Yukon, which are valid during the pendency of this Appeal.

On appeal, Yukon presented evidence that it retained the VMQ when the vessel was sold to SeaFirst through U.S. Marshal's sale. The settlement agreement and the security agreement between Yukon and SeaFirst both show that the parties understood and agreed that all limited entry rights and catch history relating to the F/V YUKON QUEEN, "however characterized," remained in the hands of Yukon and were not obtained by SeaFirst in the forced sale. I find that the language of both agreements is sufficiently clear to cover the vessel's catch history and its vessel moratorium qualification under the Groundfish Moratorium. I also find that the settlement agreement and the security agreement between Yukon and SeaFirst both constitute contracts that specify that the VMQ of the F/V YUKON QUEEN was retained by Yukon.

Under the moratorium regulations and preamble, a VMQ can be transferred by private parties by contract. The regulations provide that the Regional Director [Administrator] must approve the transfer of the VMQ before a VMP may be issued. [50 C.F.R. § 679.4(c)(8) and (9)] There is no provision requiring application for, or issuance of, a VMQ. The regulations contemplate only an application for approval of a moratorium qualification transfer. The regulations specify that an application for approval of a transfer may pertain either to a qualification that is to be or was transferred. [50 C.F.R. § 679.4(c)(8)(ii)] Thus, the role of NMFS, as provided in the regulations and preamble, is to approve (or disapprove) moratorium qualification transfers that have been or are going to be completed by private contract. [50 C.F.R. § 679.4(c)(8)(iii)]

RAM has created VMQ certificates and has created an application form for VMQ. (This is the same form used to apply for a VMP.) RAM also has created an "Application for Transfer of Vessel Moratorium Qualification" as opposed to an "Application for Approval of a Moratorium Qualification Transfer," as provided in the regulations. The existence of these forms suggests that RAM believes that it creates and issues moratorium qualifications, as evidenced by certificates, and that it actually accomplishes the transfer of moratorium qualification, rather than merely approving transfers accomplished by private parties. Neither of these RAM actions/ beliefs are provided in the regulations.

In response to my Order for Written Explanation of RAM Policy, dated January 8, 1998, RAM amended its policies with respect to the Moratorium Program, and decided that:

> No VMQ exists until a Final Rule establishing its characteristic(s) has been published; and, once it does exist, it can be bought and sold independent of the vessel and independent of whether a VMP has been issued for that vessel.
>
> Until directed otherwise by the Regional Administrator, RAM will now 'honor' vessel sales contracts which, on their face, address the transfer or retention of the vessel's associated fishing history (Moratorium Qualification), provided that any such contract was executed by both parties on or after the publication date [August 20, 1995] of the Final Rule establishing the Moratorium Program. [Written Explanation, at 11]

RAM explained that:

> Until receiving the instant challenge from OAA [Office of Administrative Appeals], RAM took the view that a VMQ did not exist (indeed, could not exist) until RAM had verified the vessel's historic fishing activity and had created a Certificate of Moratorium Qualification and issued it. . . . [W]e believed that the only way in which the regulations could be consistently interpreted, and correctly implemented, was to issue a VMQ to the owner of the vessel at the time of application. . . . [W]e held the opinion that no VMQ existed until such time as it was 'certified' through the issuance of a certificate. . . . However, upon reflection . . . the decision does not appear to be supportable. [Written Explanation, at 9-10]

The new RAM policy, however, does not help the Appellant because RAM continues to refuse to recognize contracts, such as the one in question here, that were executed before publication of the Final Rule. RAM continues in the view that parties cannot validly enter into contracts that attempt to retain or transfer VMQs before they were in existence, i.e., created by publication of the Final Rule. RAM's rationale for this view is that:

> [P]rior to Secretarial approval of the FMP amendment and publication of a Final Rule, the notion of 'Moratorium Qualification' or 'Fishing Rights' could not rise beyond being a mere expectancy; a fantastical wish, perhaps, of those who were buying and selling vessels, together with their 'fishing history,' to engage in the North Pacific fisheries.

> . . . If a vessel owner wishes to buy and sell such intangibles, s/he may of course do so but, until the Secretary, by regulation, has established the parameters of the 'qualification,' the buyers are purchasing mere air (or, in the case of a seller retaining the history of a vessel, the seller is retaining a nullity). [Written Explanation, at 7-8]

This rationale fails to recognize that parties can legally contract with respect to future rights, and interests, property, or licenses that are not yet in existence. As the Appellant correctly points out,

> there is no common law bar that would nullify contracts in such future interests [VMQs]. Further, the Moratorium Program itself has no time constraints on transactions in fishing rights.
>
> Any such limitation would be contrary to the right to contract for title or interest in any subject that is 'not forbidden by law.' [Citation omitted] For example, contracts between a willing seller and willing buyer have traditionally been recognized to include 'future rights,' and are valid even in property that is not in being or in 'esse' at the time of the agreement. [Appellant's Response, at 2]

I find nothing in the moratorium regulations or the regulatory history that prohibits, or evidences an intent to prohibit, NMFS from recognizing contracts executed before the publication of the Final Rule. Neither the FMP amendments, nor the regulations, nor the preamble to the regulations, state any time limit or restrictions on severing the VMQ from vessel ownership by contract. The regulations merely provide that a VMP that is based on a transferred VMQ cannot be issued until the Regional Administrator has approved the transfer, either before or after the transfer has occurred. [50 C.F.R. § 676.3(c) and § 676.5(d)]

A VMQ exists as an intangible interest independent of any actions by RAM. It is based on the happening of historical events (owning and fishing a vessel during a particular period). A VMQ would exist even if no one applied for it. VMQs were created when the Final Rule for the Moratorium Program was published. But a VMQ is based on a vessel's fishing history, which existed before the Final Rule was published. I see no reason why private parties, such as Yukon and SeaFirst, could not have validly agreed, before the existence of the Moratorium Program, that in a transfer of a vessel the owner would retain the beneficial ownership of the vessel's fishing history and any future "fishing rights," however denominated.

Thus, I find no legal authority to support RAM's refusal to recognize contracts executed prior to the publication of the Final Rule. I also find that recognizing such contracts is consistent with the regulations and the policies expressed therein. I find that the existence of the settlement agreement and the security agreement between Yukon and SeaFirst rebut the presumption that the VMQ belongs to the current owner of the vessel. Therefore, I conclude that Yukon has retained the fishing history and VMQ for the F/V YUKON QUEEN. I further conclude that the transfer (retention) should be approved by RAM and that a transferrable VMQ certificate should be issued to Yukon.

FINDINGS OF FACT

1. The language of both the settlement agreement and the security agreement between Yukon and SeaFirst is sufficiently clear to cover the vessel's catch history and its vessel moratorium qualification under the Groundfish Moratorium.

2. The settlement agreement and the security agreement between Yukon and SeaFirst both constitute contracts that specify that the VMQ of the F/V YUKON QUEEN was retained by Yukon.

3. The existence of the settlement agreement and the security agreement between Yukon and SeaFirst rebuts the presumption that the VMQ belongs to the current owner of the vessel, New Yukon Limited Partnership.

CONCLUSIONS OF LAW

1. Yukon has retained the fishing history and VMQ for the F/V YUKON QUEEN.

2. The transfer (retention) of the VMQ by Yukon should be approved by RAM.

3. A transferrable VMQ certificate should be issued to Yukon.

DISPOSITION AND ORDER

The IAD that denied Yukon's application for a VMQ is VACATED. RAM is ORDERED to approve Yukon's application for approval of a transfer (retention) of the VMQ for the F/V YUKON QUEEN, and to issue a transferrable VMQ certificate to Yukon. This Decision takes effect on October 19, 1998, 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 September 28, 1998, the tenth day after the date of this Decision. 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.

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Edward H. Hein
Chief Appeals Officer

[1] Formerly, 50 C.F.R. § 676.25(b). Part 676 was repealed, and its contents were reorganized and renumbered under Part 679, effective July 1, 1996. See, 61 Fed. Reg. 31,228-31,304 (1996).

[2] Formerly 50 C.F.R. § 676.5(b). The former section in question specified that the moratorium

permit is to be issued to "the owner of the vessel at the time of the permit application." The new section eliminated that language and states that the permit is to be issued to the owner of the vessel. Presumably, this still means the owner at the time of application. The summary in the Federal Register states: "This final rule does not make substantive changes to the existing regulations . . .." [61 Fed. Reg. 31,228] Thus, any substantive change in the regulation was inadvertent. In any event, the current owner requirement was in the regulation when the IAD was issued.

[3] The preamble [background information] to the moratorium regulations provides, in part: "Moratorium qualification is presumed to belong to the current owner of the vessel that made a legal landing of moratorium species from January 1, 1988, through February 9, 1992, unless otherwise specified in a purchase agreement or contract. The moratorium qualification of a vessel may be transferred from the owner of the vessel to another person by mutual agreement. For example, the moratorium qualification of a vessel may be retained by the vessel's owner for liquidation independently of the vessel. A vessel owner also may choose to retain the moratorium qualification of the vessel when it is sold, lost, or destroyed, so that he/she can obtain a moratorium permit for a replacement vessel. Regardless of the reason for transferring a moratorium qualification, valid documentation of the transfer is required before the transfer will be approved and a moratorium permit issued based on that moratorium qualification. [60 Fed. Reg. 40,766 (1995)]