

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 97-0016
	)	
BRUCE A. LEWIS,	)	DECISION ON RECONSIDERATION
Appellant	)	
	)	October 3, 2000
_____	)	

STATEMENT OF THE CASE

We issued the Decision in this case on March 27, 2000. The Decision gave the parties until April 6, 2000, to file a motion for reconsideration. We approved RAM's request to extend the deadline to April 7, 2000. On that day, RAM 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 overlooked or misunderstood.

In its motion, RAM claims we mistakenly concluded that Mr. Lewis leased the F/V KAELA C from Cal Kaela, Inc. between March 15, 1990, and May 8, 1990. Upon review of the motion, we discovered that we had overlooked material facts and law.

On April 10, 2000, we granted the motion for reconsideration, and we stayed the effective date of the Decision. We gave Mr. Lewis until April 26, 2000, to respond to RAM's motion for reconsideration. Mr. Lewis did not respond by the deadline. He told us he had been recently released from prison and he needed more time to respond to the request for reconsideration. We extended the deadline to June 2, 2000. We did not hear from Mr. Lewis. On June 22, 2000, we called him at his last known telephone number, but we were told that he was no longer employed and that his whereabouts were unknown.

On July 20, 2000, we asked Mr. Bergren if the written "draft" charter submitted by Mr. Lewis was a copy of their agreement. In a one sentence faxed response, Mr. Bergren replied that "I think the Document is ok."

Mr. Lewis' deadline to respond to RAM's motion for reconsideration has long since expired. The record on reconsideration is hereby closed.

In this Decision on Reconsideration, we conclude that even though we may have overlooked facts and law, the oversights do not change the outcome of the Decision, and that it is not necessary to conduct an oral hearing.

ISSUE

The ultimate issue on Reconsideration is whether Mr. Lewis leased the F/V KAELA C from Cal Kaela, Inc. between March 15, 1990, and May 8, 1990. (In the course of deciding that issue, we will address each of the objections raised in RAM's motion for reconsideration).

## DISCUSSION

### **OBJECTION 1. The Decision is incomplete in that it does not address the issue of whether evidence in support of Mr. Lewis' claims to have leased certain vessels was timely-filed and should have been considered by RAM.**

RAM does not have to consider untimely evidence (submitted after the 90-day evidentiary period). But this Office can consider such evidence on appeal, as long as the evidence is related to a timely claim made before RAM, and as long as the appeal is timely filed.<sup>1</sup> An appeal is timely if it is filed within 60 days of an IAD.<sup>2</sup> An actual written IAD, or the issuance of QS, constitute an "IAD" for purposes of filing a timely appeal.

Mr. Lewis claimed that he leased seven vessels on a timely-filed RFA for QS: the F/V CLIPPER ENDEAVOR, the F/V KAELA C, the F/V STARRIGAVAN, the F/V SUMNER STRAIT, the F/V SARA DAWN, the F/V JESSICA ROSE, and the F/V YUKON.

RAM issued halibut QS to Mr. Lewis, but denied Mr. Lewis' claimed lease of the first three vessels (the F/V CLIPPER ENDEAVOR, the F/V KAELA C, and the F/V STARRIGAVAN) in a written IAD. Mr. Lewis appealed the written IAD within 60 days. The appeal did not include the F/V STARRIGAVAN.

Mr. Lewis is entitled to prove on appeal that he leased the F/V CLIPPER ENDEAVOR and the F/V KAELA C because he claimed he leased the vessels on a timely-filed RFA, and because he appealed the written IAD for those vessels within 60 days. The deadline for filing the appeal did not run from the date of issuance of halibut QS because the issuance of the QS did not constitute a denial of Mr. Lewis' claimed lease of the two vessels.

We do not need to address RAM's alleged "inference" against Mr. Lewis because it is not relevant or material to the outcome of the Decision in this case.

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<sup>1</sup>See, e.g., Tiger, Inc., Appeal No. 95-0100, Decision on Reconsideration, February 26, 1996, *aff'd* March 4, 1996.

<sup>2</sup>See 50 C.F.R. § 679.43(d).

**OBJECTION 2. The Decision is incomplete in that it does not address the issue of sablefish allegedly landed aboard the F/V SUMNER STRAIT, an issue raised in Mr. Lewis' appeal of the IAD.**

We did not address whether Mr. Lewis is entitled to sablefish QS, based on sablefish landings from the F/V SUMNER STRAIT, because it was not necessary to do so. RAM did not address the matter in the IAD, and Mr. Lewis is entitled to QS based on all qualified landings made from the F/V KAELA C and the other vessels leased or owned by him during the QS base period (which includes the F/V SUMNER STRAIT). See DISPOSITION AND ORDER in the Decision dated March 27, 2000.

**OBJECTION 3. The Decision is internally inconsistent in that it states that “A hearing was not held because the record contains sufficient information on which to reach a final decision...,” even though the Appeals Officer apparently found it necessary to go outside the record, telephone a witness, and consider the results of that conversation to support the Decision’s most important finding and most significant conclusion.**

RAM claims Mr. Bergren’s statement is inadmissible because we obtained it “outside the record” without a hearing. We disagree. An Appeals Officer has the authority to build the record on appeal and to include in the record any statement that is relevant and trustworthy under the circumstances,<sup>3</sup> as long as the statement does not jeopardize the due process rights of the Appellant or a party to the appeal.

When the Appeals Officer received the record from RAM, he noticed Mr. Lewis had produced a written “draft” document for the lease of the vessel. The face of the document showed that it had been signed by Mr. Lewis and a Mr. Scott Bergren. The record did not disclose the whereabouts of Mr. Bergren. Through a series of phone calls, the Appeals Officer located Mr. Bergren. The Appeals Officer asked him if he had signed the document. He said that he had, and that he had chartered the F/V KAELA C to Mr. Lewis. The Appeals Officer did not tape the conversation, but he did record it on a piece of paper for the record.

Mr. Bergren did not know that the Appeals Officer would be calling him. Nor did he know that Mr. Lewis had applied for QS. He simply replied that he had chartered the vessel to Mr. Lewis. His remark was spontaneous, and he had nothing to gain from his remark. Mr. Lewis did not need to be present when the statement was uttered because it was favorable to him. The statement was relevant and trustworthy under the circumstances, and it did not compromise the Appellant’s rights. Therefore, a hearing was unnecessary, and the Appeals Officer properly admitted the statement into the record.

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<sup>3</sup>See 50 C.F.R. § 679.43(j).

**OBJECTION 4. The Decision is internally inconsistent in that it states that “A hearing was not held... because there is no genuine and substantial issue of adjudicative fact for resolution....” even while the Decision reached a specific, and significant, conclusion on one such disputed adjudicative fact.**

The Decision is not “internally inconsistent” for the same reasons in response to objection 3.

**OBJECTION 5. The Decision is erroneous in that it misstates a material fact in evidence and, at least to some extent, appears to rely on that misstatement to reach an erroneous conclusion.**

We mistakenly found that both parties signed a “draft” bareboat charter for the F/V KAELA C on March 15, 1990. The face of the draft shows that Mr. Bergren signed the document on March 14, 1990, and that Mr. Lewis and signed the draft on March 15, 1990. We did not accept the document as conclusive evidence because the face of the document was altered and it appeared to be a draft. On Reconsideration, the Appeals Officer acknowledges that the “draft” represented the terms of the parties’ agreement. The document is therefore useful to the extent that it sheds light on the parties’ arrangement.

**OBJECTION 6. The Decision is erroneous in that the record does not support the conclusion that Douglas Cold Storage, Inc., leased the F/V KAELA C from Cal Kaela, Inc., between March 15, 1990, and May 8, 1990.**

I will now apply to the evidence in the record the “seven factors” that we normally use in vessel lease cases to determine whether the arrangement for the F/V KAELA C constitutes a vessel lease.

**1. The parties’ characterization of their business arrangement.**

Both Mr. Lewis and Mr. Bergren acknowledge that they agreed for Mr. Lewis to charter the F/V KAELA C, and that the written “draft” document represented the terms of their arrangement for the vessel. The document provides for a “Bareboat Charter” between the “owner” of the F/V KAELA C (Cal Kaela, Inc.) and the “charterer” (Bruce Lewis). It is signed by both parties and contains terminology and provisions consistent of a vessel lease. Mr. Lewis is required to:

(1) pay the owner 40% of “net stock” (the vessel’s total revenue, less fuel costs) from crab fishing, 45% of net stock from longline fishing, and 50% of net stock from all other fishing;

(2) hire Jim Hill and Dave Phillips as crew upon terms agreed upon mutually agreed terms and conditions;

- (3) pay the “charter hire” to owner immediately upon receipt of fishing proceeds, and if feasible, to arrange the charter hire to be paid directly to the owner by persons paying for the vessel’s services;
- (4) turn over all logs, fish tickets, settlements, bills, and records to the bookkeeper, GRP/MGMT, Inc;
- (5) pay for bookkeeper services at \$200 per month;
- (6) take delivery of the vessel as is, without any express or implied warranty by the owner;
- (7) return the vessel to Yakutat, Alaska at the end of the charter in the same condition as received (beyond ordinary wear and use);
- (8) pay for cost of repair and replacement, and for loss of use of vessel at \$2,000 per day;
- (9) have full control and possession of the vessel during the charter term;
- (10) keep the vessel west of Dutch Harbor, Alaska;
- (11) be responsible for the navigation, operation, supply, fuel, and repair of the vessel, and pay all expenses for such, including bait, crew shares, groceries, supplies, etc.;
- (12) allow the owner to inspect all books, logs, and records of the vessel;
- (13) comply with all laws and regulations;
- (14) indemnify the owner for any expenses resulting from charterer’s negligence;
- (15) pay for a minimum of \$500,000 marine liability insurance, as a result of operation of vessel;
- (16) defend the owner against liability resulting from the operation of the vessel;
- (17) keep the vessel free of lines, encumbrances, or charges during the vessel’s operation;
- (18) pay all taxes and charges relating to the charter of the vessel.

In addition, the document expressly provides that the charterer is the “owner” for purposes of the vessel’s control and operation; and that the charterer is not the owner’s “employee, partner, joint venturer, agent, or representative.” The owner is entitled to all insurance proceeds as a result of the loss of the vessel; and the owner is entitled to terminate the charter for any breach of its provisions. The owner is required to deliver the vessel and its equipment to Mr. Lewis, and to pay for marine hull and machinery insurance.

The language of the fax from Mr. Bergren, which terminated the parties’ arrangement on May 8, 1990, confirms that the parties characterized their business arrangement for the F/V KAELA C as a vessel lease. The fax expressly terminates Mr. Lewis’ “charter” of the F/V KAELA C and it cites the grounds for “terminating the charter.” Nowhere does the fax refer to Mr. Lewis as an “employee” or a “hired skipper.”

Mr. Bergren stated in the fax that he “terminated the charter” because Mr. Lewis (1) did not live up to his “representations” as a “highliner” and a “hardworking fisherman;” (2) hired an “unqualified crew;” (3) provided “practically nothing” with regard to fishing gear; (4) did not “intelligently” organize or fish the vessel; and (5) “caused the vessel to be late for openings.” The allegations in the fax are consistent of a vessel lease arrangement that went wrong.

In sum, it is clear from the parties’ assertions, from the language of the written “draft” document, and from the fax that the parties characterized their arrangement for the use of the F/V KAELA C as a vessel lease at relevant times.

## **2. Possession and command of the vessel and control of navigation**

The parties agreed that Mr. Lewis would have control and command of the F/V KAELA C, including its navigation. The written “draft” document required Mr. Lewis to keep the vessel west of Dutch Harbor, but the restriction is common to bareboat charter agreements for insurance purposes.<sup>4</sup>

The weight of evidence shows that Mr. Lewis possessed and commanded the F/V KAELA C, and controlled the navigation of the vessel.

## **3. Control and direction of the fishing operations of the vessel.**

The written “draft” agreement does not expressly state who is to control and direct the vessel’s fishing operations. The document, however, does provide for Mr. Lewis to pay the fishing expenses of the vessel. The document also required Mr. Lewis, if feasible, to arrange for crew wages and for charter

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<sup>4</sup>See, e.g., the insurance contract for the F/V ESKIMO PRINCESS in Mittinen v. Cossette, Appeal No. 98-0001, March 22, 2000.

hire to be directly paid by “persons paying for the vessel’s services.” This language indicates that Mr. Lewis was free to decide where, and to whom, to sell the vessel’s fish. The CFEC fishing records show that the relevant sablefish landings were recorded on Mr. Lewis’ fishing permit. This would suggest that Mr. Lewis controlled the fishing operations of the vessel.

The weight of the evidence shows that Mr. Lewis directed and controlled the vessel’s fishing operations during the relevant period.

#### **4. The right to hire, fire, and pay the crew.**

The written “draft” agreement required Mr. Lewis to pay crew shares, unless it was feasible for the cannery or the processor to do so; and for Mr. Lewis to hire Jim Hill and Dave Phillips as crew upon mutually agreed terms and conditions. While the written document restricts Mr. Lewis’ authority to pay and hire the crew, the restrictions are limited, based on feasibility and upon mutually agreed upon terms.

The weight of evidence shows that Mr. Lewis was responsible for the hire, fire, and payment of the crew.

#### **5. Responsibility for operating expenses.**

The written “draft” agreement provided that Mr. Lewis would be responsible for trip expenses, liability insurance, repair, and the maintenance of the F/V KAELA C. The document specifically prohibited Mr. Lewis from using the F/V KAELA C as security to pay for vessel expenses. While the written agreement does not mention fishing gear, Mr. Bergren states in the May 8, 1990, fax that Mr. Lewis agreed to be responsible for it.

The weight of evidence shows that Mr. Lewis was responsible for the operating expenses of the F/V KAELA C.

#### **6. Treatment of fishing operations for tax and other purposes.**

The written “draft” agreement required Mr. Lewis to control the proceeds and settlements of the vessel’s operations, to report the financial condition of the vessel’s operations to the owner, and to pay for the services of a mutually agreed upon bookkeeper. If feasible, Mr. Lewis was required to arrange for the cannery to directly pay the owner and crew. The written “draft” agreement also required Mr. Lewis to provide liability insurance, and to indemnify the owner, for obligations arising from the vessel’s fishing operations.

The weight of evidence shows that Mr. Lewis treated the fishing operations of the F/V KAELA C as his own business during the relevant period.

## **7. Set or guaranteed term.**

The written “draft” agreement does not specify a set or guaranteed term for Mr. Lewis’ use of the vessel. While a set or guaranteed term indicates the existence of a vessel lease, the absence of a set or guaranteed term is not fatal to its existence.<sup>5</sup>

The parties agreed for the charter of the vessel to take effect on March 15, 1990. Mr. Lewis had the vessel for the period of the landings; and the May 8, 1990, fax from Mr. Bergren to Mr. Lewis shows that the arrangement remained in effect until that date. The weight of evidence shows that Mr. Lewis had the right to the possession, use, and enjoyment of the F/V KAELA C between March 15, 1990, and May 8, 1990.

### **Conclusion.**

Mr. Bergren had authority to lease the vessel to Mr. Lewis, as president of Cal Kaela, Inc.; and Lewis had authority to lease vessel from Mr. Bergren, as owner and president of Douglas Cold Storage, Inc. The parties independently acknowledge that Mr. Lewis leased the F/V KAELA C under the terms of a written charter, which are consistent of a vessel lease. The written charter took effect March 15, 1990. Mr. Bergren terminated the charter on May 8, 1990. Mr. Lewis possessed, operated, controlled, and fished the F/V KAELA C between April 9 and June 8, 1990. Therefore, the weight of evidence shows that Mr. Lewis leased the F/V KAELA C between March 15, 1990, and May 8, 1990.

### **FINDINGS OF FACT**

1. Mr. Lewis claimed he leased the F/V CLIPPER ENDEAVOR, the F/V KAELA C, and the F/V STARRIGAVAN on a timely-filed RFA, and he appealed the written IAD for the first two vessels within 60 days.
2. RAM issued halibut QS to Mr. Lewis for the F/V SUMNER STRAIT, the F/V SARA DAWN, the F/V JESSICA ROSE, and the F/V YUKON.
3. The Decision requires RAM to give Mr. Lewis credit for whatever sablefish QS he may be entitled to based on the lease of the F/V KAELA C.
4. When Mr. Bergren told the Appeals Officer that he chartered the F/V KAELA C to Mr. Lewis on March 15, 1990, he made the remark in response to an unannounced, impromptu telephone call from this Office; he did not know that Mr. Lewis had applied for QS, based on the lease of the F/V KAELA

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<sup>5</sup>See, e.g., Thomas W. Mittenen v. Leroy G. Cossette, Appeal No. 98-0001, March 22, 2000, at 15-16.



C; and he did not know the specifics of the IFQ program.

5. Only one of the two parties signed the “draft” bareboat charter for the F/V KAELA C on March 15, 1990.
6. The Decision did not discuss the seven factors that we normally use to determine the existence of a vessel lease.
7. The written “draft” agreement for the F/V KAELA C represented the terms of the parties’ arrangement for the vessel.
8. Mr. Lewis possessed, operated, controlled, fished, assumed financial risk, and landed sablefish from the F/V KAELA C on April 9, April 13, April 23, May 4, and June 8, of 1990.
9. The parties agreed for Mr. Lewis to lease the F/V KAELA C on March 15, 1990.
10. The parties terminated the lease of the F/V KAELA C on May 8, 1990.

#### CONCLUSIONS OF LAW

1. RAM is not required to consider untimely evidence for purposes of the initial issuance of QS.
2. The deadline for filing an appeal of the F/V CLIPPER ENDEAVOR and the F/V KAELA C did not run from the date of issuance of halibut QS because the issuance of the QS did not constitute a denial of Mr. Lewis’ claim of the lease of the two vessels.
3. Mr. Lewis is entitled to prove on appeal that he leased the F/V CLIPPER ENDEAVOR and the F/V KAELA C.
4. The Decision is complete without addressing whether RAM should have issued sablefish QS to Mr. Lewis, based on sablefish landings from the F/V SUMNER STRAIT.
5. An Appeals Officer has the authority to build the record on appeal and to include in the record any statement that is relevant and trustworthy under the circumstances, as long as the statement does not compromise the Appellant’s or a party’s due process rights.
6. Mr. Bergren’s statement that he chartered the F/V KAELA C to Mr. Lewis is admissible because it is trustworthy under the circumstances and it is directly relevant to the issue on appeal.
7. The finding that both parties signed a draft bareboat charter for the F/V KAELA C on March 15,

1990, was incorrect.

8. The terms of the written “draft” agreement between Mr. Bergren and Mr. Lewis for the F/V KAELA C are consistent with a vessel lease.

9. Mr. Lewis leased the F/V KAELA C between March 15, 1990, and May 8, 1990.

#### DISPOSITION

The Decision in this Appeal is Affirmed. The Decision on Reconsideration takes effect November 2, 2000, unless by that date the Regional Administrator orders review of the Decision on Reconsideration.

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Randall J. Moen  
Appeals Officer