

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 95-0001  
)  
RICHARD G. ENCELEWSKI, ) DECISION  
Appellant )  
\_\_\_\_\_ ) March 14, 1997

STATEMENT OF THE CASE

Appellant Richard G. Encelewski filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on August 29, 1994. The IAD denied his application for halibut Quota Share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program because it was not filed by the July 15, 1994, application deadline. Mr. Encelewski has adequately shown that his interest is directly and adversely affected by the IAD. Because the facts are not in dispute, no hearing was ordered.<sup>1</sup>

ISSUES

1. Whether NMFS should accept Mr. Encelewski's application as if timely filed.
2. Whether the IFQ program violates the common law trust doctrine, the 10th Amendment of the U.S. Constitution, and the Magnuson Act under 16 U.S.C. § 1853(6).

BACKGROUND

The Division received Mr. Encelewski's RFA on July 25, 1994, ten days after the filing deadline of July 15, 1994. The IAD rejected the RFA as untimely. Mr. Encelewski concedes the late filing of his appeal.<sup>2</sup> Mr. Encelewski claims the IFQ program is illegal and unconstitutional, and that he should be permitted to apply for QS because he filed his RFA before the 1994 halibut fishing season opened.

DISCUSSION

**1. Whether NMFS should accept Appellant's application as if timely filed**

Under the IFQ program, an application for QS "will not be considered" if it is received after the close

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<sup>1</sup>See, 50 C.F.R. § 679.43(g), formerly 50 C.F.R. § 676.25(g).

<sup>2</sup> See, Mr. Encelewski's Appeal at paragraph 4.

of business on July 15, 1994.<sup>3</sup> The Division treated an RFA as the equivalent of an application for the purpose of meeting the IFQ filing deadline.<sup>4</sup> In spite of the July 15, 1994 deadline, the Division accepted, as timely filed, an RFA postmarked on or before July 15, 1994.<sup>5</sup>

Mr. Encelewski's RFA was stamped by the Division as received on July 25, 1994. The original of the RFA and the envelope in which it was received is not in the Division's file. A notation on a photocopy of the RFA, which is in the file, indicates that the envelope was postmarked July 21, 1994. The notation was made by Division staff member Obren Davis. Mr. Encelewski admits that he filed his RFA after the deadline. He contends, however, that the deadline should not be held against him because his RFA was submitted before the opening of the 1994 halibut fishing season.

Nothing in the IFQ regulations or elsewhere authorizes me or the National Marine Fisheries Service to accept a late application (or RFA) as timely filed on the grounds that it was filed before the opening of the 1994 halibut fishing season. Where an RFA was not received by, or sent to, the Division on or before July 15, 1994, it cannot be considered timely filed unless there is a basis for equitably tolling the filing deadline. Mr. Encelewski has not alleged circumstances that would support the application of the equitable tolling doctrine in his case, nor is there any such evidence in the record. Therefore, I find that there is no basis for accepting Mr. Encelewski's RFA as if it were timely filed.

## **2. Whether the IFQ program violates the common law trust doctrine, the 10th Amendment of the U.S. Constitution, and the Magnuson Act under 16 U.S.C. § 1853(6).**

Mr. Encelewski argues that the entire IFQ program is illegal because it is in violation of the 10th Amendment of the U.S. Constitution, the Magnuson Fishery and Conservation Act, and common law. I must presume the legal validity of the program's duly promulgated regulations.<sup>6</sup> Therefore, Mr. Encelewski's challenge to the legality of the IFQ program is not within the purview of this Office. The appropriate forum for Mr. Encelewski's challenge to the legality of the IFQ program is the United States District Court.

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<sup>3</sup>See, 59 Fed. Reg. 701-702 (January 6, 1994).

<sup>4</sup>See, Keith A. Buehner, Appeal No. 94-0001, September 26, 1994, *aff'd* March 2, 1995.

<sup>5</sup>See, Memorandum of Philip J. Smith, July 26, 1994.

<sup>6</sup>See, George Ramos, Appeal No. 94-0008, Regional Director's Decision on Review, at 4, April 21, 1995, where "it is wholly inappropriate for an administrative appeals officer to pass judgment on either the validity or the wisdom of duly promulgated regulations and policies;" and Charles J. Petticrew, Appeal No. 95-0008, July 3, 1996, *aff'd* August 2, 1996.

## FINDINGS OF FACTS

1. Mr. Encelewski's application (RFA) was not timely filed with the Division.
2. There is no basis for accepting Mr. Encelewski's RFA as if it were timely filed.

## CONCLUSION OF LAW

Mr. Encelewski's challenge to the legality of the IFQ program is not within the purview of this Office.

## DISPOSITION

The Division's IAD denying Mr. Encelewski's application as late is **AFFIRMED**. This decision takes effect April 14, 1997, unless by that date the Regional Administrator orders the 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 24, 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.

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John G. Gissberg  
Appeals Officer

I concur in the factual findings of this Decision and I have reviewed this Decision to ensure compliance with applicable laws, and agency policies, and consistency with other appeals Decisions of this Office.

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Randall J. Moen  
Appeals Officer