NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0010
JOHN A. KRISTOVICH,	)	
Appellant	)	
	)	DECISION
and	)	
	)	
RAYMOND W. DELL,	)	
Respondent	)	March 20, 1996
_____	)	

STATEMENT OF THE CASE

Both John A. Kristovich and Raymond W. Dell applied for Quota Share (QS) under the Pacific halibut and sablefish Individual Fishing Quota (IFQ) program. Mr. Kristovich claims QS as the owner of the F/V CAPE FALCON. Mr. Dell claims QS as an alleged lessee during the periods April 1 through July 10 of 1989, 1990, and 1991.

The Restricted Access Management Division [Division] of the National Marine Fisheries Service, in an Initial Administrative Determination [IAD] dated January 5, 1995, allocated to Raymond W. Dell the qualifying pounds of sablefish and halibut resulting from landings from the F/V CAPE FALCON during 1989, 1990, and 1991. The IAD stated that Mr. Dell's claim that he leased the F/V CAPE FALCON pursuant to an unwritten lease was supported by evidence "that he assumed the financial burden of the fishing operation, including that he hired and paid crew members, obtained financing for the operation, maintained the vessel, purchased, owned and utilized longline gear, paid for vessel insurance, etc." The IAD stated that Mr. Kristovich had denied the existence of a lease, but that he failed to explain the relationship between himself and Mr. Dell during the relevant times.

Mr. Kristovich timely appealed. He denies the existence of either a written or an oral lease, and contends that Mr. Dell was the captain of the F/V CAPE FALCON during the relevant times. He asserts that, at the time that he presented his evidence to the RAM Division, he had not realized that Mr. Dell had been claiming an oral lease, and accordingly had neither addressed nor presented evidence on that issue. Mr. Kristovich denies that the expenses listed in the IAD were in fact paid by Mr. Dell.

On appeal, the parties presented voluminous evidence that had not been considered by the Division. This evidence includes affidavits of witnesses, invoices, receipts, checks and other documents supporting their respective interpretations of the arrangement under which Mr. Dell ran the F/V CAPE FALCON.

I found that this case meets the criteria for an oral hearing[1] on the single issue of whether Mr. Dell was the lessee of the F/V CAPE FALCON during the relevant times. The oral hearing did not address Mr. Kristovich's claim that he was denied due process by not being provided the materials submitted by Mr. Dell. Because, on appeal, the entire record is reviewed *de novo*, Mr. Kristovich was not prejudiced by not having Mr. Dell's evidence. The parties now have had the opportunity to review and respond to each other's evidence. This appeal is decided based on the entire administrative record, including documents submitted to the Division and on appeal.[2]

The oral hearing was held on September 18, 1995, in Seattle, Washington. Appellant John A. Kristovich, his son, John M. Kristovich, and respondent Raymond Dell testified at the hearing.

ISSUE

Whether Raymond W. Dell held a vessel lease of the F/V CAPE FALCON during the qualifying years of 1989, 1990 and 1991.

BACKGROUND

At the times relevant to this appeal, Mr. Kristovich owned two vessels. Both were used in longlining for halibut and sablefish as well as salmon seining and other fisheries. The first is the F/V CAPE FALCON, a wooden 48-foot vessel. The second is the F/V MISS BLU, a 68-foot steel vessel. Mr. Kristovich ran the F/V CAPE FALCON prior to the years at issue in this appeal. He generally would not longline all the openings, but would instead start seining for salmon in July. Mr. Kristovich's son, John M. Kristovich, ran the F/V MISS BLU.

At the times relevant to this appeal, respondent Raymond Dell was married to Mr. Kristovich's daughter, Yolanda Dell. Mr. Dell had previously crewed for Mr. Kristovich on the F/V CAPE FALCON. He had also crewed for others, and had run his own smaller vessel, the F/V LOWATER.

Sometime in the winter of 1988-89, the parties discussed Mr. Dell's running the F/V CAPE FALCON in the longline fisheries of 1989. Mr. Kristovich intended for the F/V MISS BLU to longline for the first time that season, but did not have sufficient longlining gear to equip both vessels. The parties have differing recollections of their initial discussions about Mr. Dell running the F/V CAPE FALCON. Mr. Kristovich recalls that, until he encountered significant medical problems in early 1989, he had intended to run the F/V CAPE FALCON himself . He recalls that, after first approaching another fisherman, he

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[1] *See* 50 C.F.R. 676.25(g)(3).

[2] *See* 50 C.F.R. 676.25(k).

asked Mr. Dell if he wanted to run the F/V CAPE FALCON. He testified that Mr. Dell did not jump at the idea right away, and that he was skeptical. Mr. Kristovich assured Mr. Dell that there was nothing to it, and that he would provide Mr. Dell the log books to show him where to locate halibut. Mr. Dell, on the other hand, testified that at the end of 1988 he asked Mr. Kristovich if he could run the F/V CAPE FALCON. He testified that Mr. Kristovich agreed, as long as Mr. Dell provided the gear. At the time, he did not know of Mr. Kristovich's medical situation.[3]

The details of the arrangement were not spelled out with any precision. Mr. Dell conceded, "Mr. Kristovich and I never really sat down and talked about who would pay for what as far as the operation of the CAPE FALCON went." [Tape 5, side 1: 420]. Mr. Kristovich also testified that they never formally sat down to discuss their arrangement.

Nevertheless, the parties agree on certain essential terms of the arrangement:

- Mr. Dell was to provide the longlining gear (with the exception of certain items loaned by Mr. Kristovich);
- Mr. Dell would operate the vessel in longline fisheries as its captain;
- Mr. Kristovich would take care of insurance;
- According to his standard practice, Mr. Kristovich would receive 3 percent of the gross to compensate him for the P&I insurance;
- Mr. Kristovich would receive 15 percent of the adjusted gross as his boat share;
- Mr. Dell would receive 15 percent of the adjusted gross as his captain's share plus his share for providing gear and would also receive a crew share.

There was no discussion of how long the arrangement would last. However, the parties apparently understood that the vessel would be returned in time for salmon seining in July.[4] The parties did not discuss who was to pay for maintenance and repair of the vessel should they become necessary during the longlining season.

During the times that Mr. Dell ran the F/V CAPE FALCON, Mr. Kristovich provided to Mr. Dell the use of the F/V CAPE FALCON bank account he maintained with the National Bank of Alaska. Mr. Kristovich added Mr. Dell as a co-signor on that account. Mr. Kristovich placed funds into the

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[3]I find that both parties are unable at this point to recall the particulars of their initial conversations about Mr. Dell running the F/V CAPE FALCON. However, it is not material whether the idea originated with Mr. Kristovich or with Mr. Dell. Accordingly, I have made no finding of fact on this issue.

[4] Because salmon seining is less physically taxing than longlining, Mr. Kristovich was able to engage in this fishery after Mr. Dell returned the vessel despite his medical condition.

account so that Mr. Dell could make purchases for the F/V CAPE FALCON prior to receiving fishing proceeds. Those proceeds were expected to refund the expenses paid from the account.

APPLICABLE LAW

The owner of a vessel will receive QS in connection with relevant landings of halibut and sablefish unless there was a lease of the vessel.

> A person is a qualified person also if (s)he leased a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year. A person who owns a vessel cannot be a qualified person based on the legal fixed gear landings of halibut or sablefish made by a person who leased the vessel for the duration of the lease.[5]

The regulations do not define "lease," but discuss the evidence that will establish the existence of a lease:

> Conclusive evidence of a vessel lease will include a written vessel lease agreement or a notarized statement from the vessel owner and lease holder attesting to the existence of a vessel lease agreement at any time during the QS qualifying years. Conclusive evidence of a vessel lease must identify the leased vessel and indicate the name of the lease holder and the period of time during which the lease was in effect. *Other evidence, which may not be conclusive, but may tend to support a vessel lease, may also be submitted.*[6] [Emphasis added].

Here, there is no conclusive evidence of a lease, either in the form of a written lease agreement or a notarized statement. Mr. Dell contends that he has presented sufficient "other evidence" of an oral lease to establish that he was the lessee of the F/V CAPE FALCON during the relevant periods.

The issues of (1) what types of business arrangements *are* unwritten leases for the purposes of the IFQ program and (2) what *evidence* will be sufficient to establish the existence of such arrangements are separate, albeit intertwined, issues. I will address these issues in turn.

A. What is an unwritten "lease" for the purposes of the IFQ program?

The North Pacific Fishery Management Council [Council], which enacted the regulations controlling the IFQ program, did not define the term "lease." As will be discussed more fully below, guidance as to

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[5] *See* 50 C.F.R. 676.20(a)(1).

[6] *See* 50 C.F.R. 676.20(a)(1)(iii).

the meaning of this term in the context of the IFQ regulations can be found in (1) the fact that the Council grouped lessees with owners as having capital investment and financial risk in the halibut and sablefish industries; (2) the fact that the Council did not use the terms "bareboat charter" or "demise" in its final regulations; and (3) usage of the term "lease" in other contexts.

1. Capitalization and entrepreneurial participation.

The Council, from the time of the earliest proposed regulations for the IFQ program, indicated that initial allocations of QS would be based on capital investment and financial risk, as opposed to mere participation in the fisheries. The commentary accompanying an earlier version of the proposed regulations for the IFQ program stated:

> The Council established the criterion of vessel ownership or lease for an initial allocation of QS because *it determined that vessel owners or leaseholders were principally responsible for the financial risk in undertaking a commercial fishing venture*.
>
> The Council recognized that hired masters of fishing vessels and other crew members also are instrumental in the success or failure of a fishing venture, and that they do so at considerable personal and financial risk. However, *hired masters and crew have substantially less capital investment in the fishery than vessel owners and leaseholders*. One of the objectives of the proposed IFQ program is to reduce excess capitalization in the halibut and sablefish fixed gear fishery. Hence, *allocation of QS only to vessel owners and leaseholders is reasonable because it is their decision whether to reduce or increase capital investment in harvesting capacity.*

[57 Fed. Reg. 57,234 (December 3, 1992) (emphasis added)].

Nearly a year later, the Council again explained that its decision to initially allocate QS to owners and lessees was based on capital investments and risks by those persons:

> [T]he Council decided to give eligibility for initial allocations only to vessel owners and lease holders because they have a capital investment in the vessel and gear that continues as a cost after crew and vessel shares are paid from a fishing trip.

[58 Fed. Reg. 59, 375, at 59,386 (Nov. 9, 1993) (response to Comment 13)].

> The Council's rationale for this particular allocation is that vessel owners and lease holders are the participants who supply the means to harvest fish, suffer the financial

and liability risks to do so, and direct the fishing operations.

[58 Fed. Reg. 59,375, at 59,378 (Nov. 9, 1993)].

The Office of Administrative Appeals in O'Rourke v. Riddle[7] considered the history of the IFQ regulations, and concluded:

> [I]t appears that the Council intended to allocate Quota Share to those who acted like entrepreneurs in controlling and directing the fishing operations that produced the legal landings in question. An entrepreneur is one who organizes, operates, and assumes the risk in a business venture in expectation of gaining the profit. [Citation omitted]. This is the kind of person the Council seems to have had in mind when it decided that vessel lessees, as well as vessel owners, could be "qualified persons." The RAM Division, too, appears to have envisioned a lessee as one who was an entrepreneur with respect to the fishing operations.[8]

2. Rejection of terms "bareboat charter" and "demise."

The O'Rourke decision also concluded that the term "lease" for the purposes of the IFQ regulations does not need to be a "bareboat charter" or "demise."[9] The Council, in early motions and proposed IFQ regulations, used the terms "bare-boat charter," and "vessel charter demise" to describe the type of arrangement that would qualify an entity to an initial allocation of QS. See O'Rourke, at 11, note 1 (citing *Newsletter* (North Pacific Fishery Management Council) No. 6-91, December 19, 1991, at 13-14); 57 Fed. Reg. 233, 57234, 57147 (Dec. 3, 1992). In its final regulations, however, the Council abandoned use of those terms in favor of the word "lease."

It is not clear from the regulations themselves or from pertinent regulatory history whether the Council abandoned the terms "bareboat charter" and "demise" because it intended to encompass a broader range of arrangements than those terms would allow, or whether it believed the term "lease" was more easily understood by laypeople. Accordingly, I have not given a great deal of weight to the Council's rejection of those terms, or indeed the fact that the Council chose not to define "lease." I note that the Council left some room for case-by-case determination of whether an arrangement qualifies as a "lease" for the purposes of the IFQ regulations.

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[7] Appeal No. 95-0018, decided May 18, 1995, affirmed May 23, 1995.

[8] *Id.*, at 11-13.

[9] *Id.*, at 12.

3. Other definitions of "lease."

In the treatises and case law, "lease" is not the standard word for describing the relationship between a vessel owner and another who uses the vessel. Rather, the terms most commonly used are "charter" and "demise." There are three standard types of charter arrangements in maritime law.[10] In the first, the "voyage charter," the vessel is engaged to carry cargo on a single voyage and is manned and navigated by the owner.[11] In the second, the "time charter," the vessel typically is still manned and navigated by the owner, but during the term of the charter the charterer may decide the ports touched, the cargo loaded and other business matters.[12] The "demise" or "bareboat charter" allows the charterer to take over the vessel "lock, stock and barrel," similar to a lease of real or personal property.[13]

Because the term "lease" does not have a specific definition in maritime law, it is appropriate to turn to other sources. The term "lease", when it does not refer to real property, is defined in relevant part as follows:

> Agreement under which owner gives up possession and use of his property for valuable consideration and for definite term and at end of term owner has absolute right to retake, control and use property. . . .
>
> When used with reference to tangible personal property, word "lease" means a

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[10] *See* Gilmore, The Law of Admiralty (2d ed. 1975), at 93.

[11] *Id.*

[12] *Id.*, at 194.

[13] The term "bareboat charter" has been likened to a lease of real or personal property:
[The bareboat charterer] becomes, in effect, the owner *pro hac vice*, just as does the lessee of a house and lot, to whom the demise charterer is analogous. Gilmore, The Law of Admiralty (2d ed. 1975), at 194. Distinctions between the various types of charters are frequently made in the context of issues unrelated to the IFQ program. In the case law, the issue is usually whether a crew member or third party may sue the owner for damages. An owner is generally not liable to crew and third parties for negligent operation of the vessel during the term of a bareboat charter, but is liable only if the vessel was not seaworthy. Possibly because a finding that a bareboat charter existed could leave an injured party without meaningful recourse, the cases distinguishing bareboat charters from other charters are reluctant to find this relationship to have existed in the absence of the parties' express intent to create a demise and the complete and exclusive control of the vessel by the charterer. E.g., Matute v. Lloyd Bermuda Lines, Ltd., 931 F.2d 231, 235 (3d Cir. 1991); Wolsiffer v. Atlantis Submarines, Inc., 848 F. Supp. 1489, 1494-95 (D. Hawaii 1994); Stafford v. Intrav, Inc., 841 F. Supp. 284, 286-87 (E.D. Mo. 1993).

> contract by which one owning such property grants to another the right to possess, use and enjoy it for specified period of time in exchange for periodic payment of a stipulated price, referred to as rent. . . .

Black's Law Dictionary (6th ed. 1990), at 889 (Citations omitted).

4. Factors for finding a lease.

As discussed above, although the term "lease" is not defined in the IFQ regulations, the Council intended that lessees, in addition to owners, could receive initial allocations of quota shares due to their having some characteristics in common with owners during the lease term. There is a great variety in business arrangements between owners and operators of fishing vessels. A case-by-case analysis must be done to determine if a given arrangement is the type of arrangement the Council intended to recognize as a "lease."[14]

Having concluded that the Council intended to award QS to those who acted like entrepreneurs in controlling and directing the fishing operations at issue, the decision in O'Rourke lists factors an Appeals Officer should consider in determining whether a lease existed. Most of these factors focus on the nature of the relationship between the owner and the claimed lessee, as opposed to the type of *evidence* that would normally establish the nature of the relationship.

> In deciding whether a vessel lease existed between the parties, an Appeals Officer should . . . consider a variety of factors. These include, but are not limited to:
>
> (1) whether and to what extent the claimed lessee had possession and command of the vessel and control of navigation of the vessel;
>
> (2) whether the claimed lessee directed fishing operations of the vessel;
>
> (3) whether the claimed lessee had the right to hire, fire, and pay the crew;
>
> (4) whether the claimed lessee was responsible for the operating expenses of the vessel; and

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[14]Of course, only the regulations ultimately adopted by the Council are relevant. The contemporaneous regulatory history quoted in this and other appeals decisions has the limited purpose of illuminating the Council's intent as expressed to the public and the options considered by the Council prior to adoption of the final regulations. However, I have given no weight to the affidavit of Council member Robert Alverson submitted in this appeal to the extent Mr. Alverson testifies regarding his beliefs as to the Council's intent.

(5) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her own business for federal income tax and other purposes.

Some of the O'Rourke factors will generally apply to either a lessor/lessee arrangement or a typical owner/hired skipper[15] arrangement when the owner is not on board the vessel. For example, in light of the distances travelled in longlining ventures and the need for the captain to control the vessel and crew, the first three factors will usually be satisfied by either of those arrangements. However, when one of those factors is *not* satisfied, this would cast considerable doubt on whether the relationship could be characterized as an unwritten vessel lease.

The fourth factor focusses on whether the claimed lessee is responsible for operating expenses of the vessel. As discussed more fully below, typically the crew will share certain operating expenses of each fishing trip. Therefore, the fourth O'Rourke factor should focus on expenses for the *vessel* that are above and beyond the typical operating expenses of a given fishing *trip* borne by all. Another appropriate inquiry is which party initially paid for those expenses that ultimately were to be reimbursed out of the fishing proceeds.

The fifth factor focusses on whether the venture was treated as the claimed lessee's own business, as opposed to responsibilities undertaken as an agent of the owner. In other words, was the claimed lessee operating the vessel for the owner or on his or her own behalf.

The O'Rourke factors are not exclusive. Other factors will often be relevant in determining the nature of the business relationship.

Another factor that will usually be relevant is whether the business arrangement had a set term. If the arrangement could terminate any time the owner decides to board the vessel and take command, this would appear to be inconsistent with the interests of a claimed lessee operating a viable independent business. It would also be inconsistent with the normal definition of a "lease," quoted above.

The Fifth Circuit has stated that an owner's right to terminate the relationship at any time is inconsistent with a bareboat charter.[16]

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[15]Due to the nature of this industry, neither the captain nor the crew is "hired", in the sense of being employed; rather, they are technically considered independent contractors. The true distinction is thus between an independent contractor agent and an individual who leases an item -- the vessel -- and uses it on his own behalf in his own business.

[16]As noted above, a "bareboat charter" is not required here. However, the closer the relationship is to a bareboat charter, the more likely that it qualifies as a "lease."

> Considering the relative economic disparity between the owner of an expensive ocean-going vessel with high costs for operation, bunkering, maintenance and insurance, and a prospective master whose only investment in the enterprise is his time and energy, this right to terminate is a powerful force. The notion that such a master really has the full command, possession and control of the ship to do as he pleases in that fishing trade is simply not realistic.

[See Deal v. A. P. Bell Fish Co., 674 F.2d 438, at 441 (5th Cir. 1982) (quoting Bishop v. United States, 476 F.2d 977, 979 (5th Cir. 1973) cert. denied, 414 U.S. 911 (1973)].

In Stevens v. Seacoast Co., 414 F.2d 1032 (5th Cir. 1969), the court analyzed several factors to determine that no bareboat charter existed, and concluded that the absence of a lease term is particularly significant:

> When there is added to all of this . . . the fact that there is no tenure or substantial duration in point of time of the arrangement between Shipowner and Master so that at the first moment the "independent" contractor displeases the shipowner the agreement can be revoked at will, it demonstrates that no real possessory rights are invested in the so-called charterer. But this is the essential requisite of a demise charter to distinguish it from time and voyage charters and the like.

[See 414 F.2d at 1036].

I would accordingly add the following to the five factors listed in O'Rourke, although it could also be deemed a subfactor of the first O'Rourke factor:

> (6) whether the claimed lease had a set or guaranteed term.

B. What Evidence Will Establish a "Lease?"

In the final regulations for the IFQ program, the Council expanded the type of evidence that would be admitted to establish an unwritten lease. The Council commented on this expansion from its earlier proposed regulations as follows:

> The types of evidence that can be submitted to verify a vessel lease would be expanded. The Council intends to open the appeals process to persons who claim they had a lease but who are unable to produce the specific evidence requirement under the current regulatory language. Other types of evidence that could be submitted under the proposed rules include canceled checks or receipts for IPHC or Commercial Fisheries

> Entry Commission permits, Internal Revenue Service tax forms showing a business deduction for the lease, or 1099 tax forms demonstrating the payment of crew.
>
> The proposed language, like the current language, would not assure that the evidence submitted would verify the vessel lease claimed. NMFS will carefully evaluate all evidence submitted to verify a vessel lease agreement.

The Council had considered making tax forms dispositive of the existence of a lease. The Council explained the basis for its rejecting that language in a response to public comment:

> *Comment 56*: The wording at § 676.20(a)(1)(iii) is vague regarding evidence of a verbal vessel lease which is common practice in the catcher vessel fleet. One recommended form of documenting such vessel leases is to determine who paid the crew members and, therefore, was responsible for issuing them their Federal income tax form 1099.
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> *Response*: NOAA agrees that language in the proposed paragraph regarding Federal income tax documents is vague, but limiting acceptable documentation to a specific tax form, such as Form 1099, does not improve the paragraph. Therefore, Federal income tax documents are deleted from § 676.20(a)(1)(iii) as acceptable evidence of a vessel lease, for purposes of initial allocation to vessel lease holders. This language was included in the proposed rule in response to fishing industry concerns about documenting the existence of a vessel lease. Some fishermen argued that vessel lease holders would be responsible for mailing IRS Form 1099 to the crew and that this would demonstrate the fact that persons issuing such forms were lease holders. This is a vague standard because persons hired by a vessel owner may submit this form to the IRS on behalf of the vessel owner. The final rule deletes this evidence of a vessel lease. The option of an after-the-fact statement from the vessel owner and lease holder attesting to the existence of a lease remains for persons who did not have a written vessel lease agreement. Agreement should be reached between former vessel owners and lease holders to draft and sign such statements when there was no previous written lease.

[58 Fed. Reg. 59,375, at 59,393 (Nov. 9, 1993)].

The O'Rourke decision noted:

> The RAM Division, in its instructions to applicants, stated that persons claiming they were lessees should submit documents proving that they "shouldered the financial

burdens and risks of the fishing operation." As examples of such documents the instructions listed:

> the receipt(s) for purchases of the license(s) used aboard vessel during the time period(s) for which you are claiming credit;
>
> tax returns that show that you claimed a business deduction for vessel lease expenses during the time period(s) for which you are claiming credit;
>
> tax returns or other documents that show that you paid the crew expenses during the time period(s) for which you are claiming credit; and/or
>
> other authentic and contemporary documents demonstrating the nature of your investment in the fishing operation during the time period(s) for which you are claiming credit.

In addition to documentary evidence listed above, the regulations allow consideration of any "[o]ther evidence, which . . . may tend to support a vessel lease . . . " [See 50 C.F.R. § 676.20(a)(1)(iii)]. In light of the provision in the regulations for oral and written hearings, 50 C.F.R. § 676.25(g), it is clear that the "other evidence" may include oral or written testimony by the parties or other witnesses.

The evidence submitted by the parties may be significant in determining either the form or the substance of the relationship. For example, it may be significant that the parties either used, or did not use, the terms "lease" or "charter" to describe their arrangement. If the parties never used those terms, either orally or in contemporaneous writings, and if the terms of their relationship were consistent with industry standards for the typical hired skipper relationship, this would suggest that they did not intend a lease relationship. Conversely, use of the term "lease" or "charter" in a relationship that is substantively consistent with those terms, is highly persuasive even when not conclusive.[17]

DISCUSSION

It is necessary to explore evidence of the business relationship between the parties to determine whether the relationship is properly considered a "lease" for the purpose of the IFQ regulations. Mr. Kristovich has consistently denied the existence of any lease, oral or written. Mr. Kristovich's affidavit

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[17] *See* Treinen v. Scudder, Appeal No. 95-0104, decided October 11, 1995, affirmed October 18, 1995.

on appeal asserted in relevant part: "I hired Raymond Dell to run the F/V CAPE FALCON for longlining sable fish and halibut during the years 1989, 1990, 1991 and 1992. I fired him in September 1992. I did not lease the CAPE FALCON to Raymond Dell. I never signed any written lease to the CAPE FALCON, nor did I ever agree to any oral lease to the CAPE FALCON. In fact, during the years 1989 through 1991, Raymond Dell and I never even discussed a lease to the vessel." [See Ex. 102, at 1-2]. Mr. Dell has conceded that the term "lease" was not used to describe the arrangement. Through counsel, he concedes that the arrangement would not qualify as a "bareboat charter." However, Mr. Dell asserts that the arrangement qualifies as a "lease" for the purposes of the IFQ regulations.[18]

The record contains evidence of industry standards regarding divisions of fishing proceeds of longline operations amongst the owner, captain, and crew. Mr. Kristovich submitted the affidavit of Robert A. Alverson, the manager of Fishing Vessel Owners' Association. He testified in his affidavit:

> In my capacity as manager of FVOA, I have been involved in the negotiation of the Set Line Agreement ("Agreement") between the Deep Sea Fisherman's Union of the Pacific ("DSFU") and the FVOA. The Agreement sets forth rights and obligations between the master or vessel owner and the crew. . . .
>
> Pursuant to that Agreement, for each fishing trip, "gross stock expenses" are deducted from the gross stock. Gross stock expense includes various fees and lost gear. Therefore, the "gross stock expenses" are shared proportionately by the vessel owner, the master and the crew.
>
> A 31.5% "boat share" is deducted from the balance (the "adjusted gross stock").
>
> After deducting the "boat share", the "crew expense" (for example: grub, fuel oil, lube oil, salt, bait, condemned fishing gear, etc.) is deducted. Therefore, the "crew expenses" are shared proportionate by the master and the crew.
>
> The remainder is distributed to the master and the crew based upon their share

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[18]I have given no weight, and in some cases have stricken from the record, opinions and assertions of various witnesses as to whether the business arrangement is properly characterized as a "lease" for the purposes of the IFQ regulations. I have given no weight to the inconsistent statements of the parties' accountant regarding whether a "lease" existed, in that the accountant has denied ever being informed by the parties whether the relationship was a lease. I do consider relevant, although not dispositive, the parties' own characterization of their relationship during the times at issue.

percentage.

> In practice, the master receives a full crew share plus an agreed percentage (usually 10%-25%) from the "boat share."

[Ex. 120, at 6-7].[19]

Mr. Alverson's testimony regarding practices in the industry is corroborated by testimony of witnesses for both parties. Captain Karl Vedo testified in an affidavit submitted by Mr. Dell that when he served as a hired captain, he received a standard crew share plus 15% of the boat share. [Ex. 44]. Crewman Alex Peura testified in an affidavit submitted by Mr. Kristovich that the arrangements on the F/V CAPE FALCON and F/V MISS BLU were both "approximately the same as the settlement arrangements for the Deep Sea Fisherman's Union longline vessels and reflected customary arrangements in the halibut and sablefish longline industries." [Ex. 132, at 4]. Ginger Knutsen, an accountant familiar with longline settlements, testified in an affidavit submitted by Mr. Kristovich that sample settlement sheets for trips at issue in this appeal "are similar to the settlement sheets prepared on behalf of all longline vessel owners when the vessel owner hires a captain to run the vessel. The allocation of expenses and crew shares reflect customary practices within the industry." [Ex. 134]. However, Ms. Knutsen testified that the arrangement differed from the Set Line Agreement in that 3 percent for insurance was deducted off the top and the total boat share was 30 percent. Under the Set Line Agreement, insurance is paid from the standard 31.5 percent boat share. John M. Bruce, executive director of the Deep Sea Fishermen's Union of the Pacific, testified in an affidavit submitted by Mr. Dell that the settlement formula for the trips at issue "is approximately the same as used by the DSFU and is consistent with the method of computing said statements in the longline fishery. [Ex. 37, at 3]. Mr. Bruce noted that it is unusual for a hired captain to provide gear and to be provided a "gear share" such as the share received by Mr. Dell. [*Id.*]

Mr. Kristovich asserts that he paid Mr. Dell "a more than generous captain's share" because he was his son-in-law. [Ex. 102, at 3]. He claims that Mr. Dell was permitted to claim a "gear share" in addition to his captain's share because Mr. Dell obtained some used ("condemned") longline equipment from their mutual friend, Duane Torgerson. [*Id.*] Mr. Kristovich testified in an affidavit, "[W]e understood that if I let Ray use his own gear, he could claim the 'gear share' of the longlining fishing earnings. Because he was my son-in-law, that was okay with me. Mr. Dell's idea was that if he could provide the gear and receive the gear share, then he could deduct the expenses for replacing the gear lost or

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[19]The Set Line Agreement that is attached to Mr. Alverson's affidavit is dated February 24, 1994, and thus could not have controlled the relationship of the parties during the time periods relevant here. Ex. 125. However, Mr. Dell concedes that the terms of the Set Line Agreement have not materially changed, and that the parties intended their arrangements to be modelled on that agreement.

condemned with new gear from the crew." [Ex. 102, at 3]. Mr. Dell admitted that Mr. Kristovich was generous to him, and had even initially proposed that he receive greater compensation for running the F/V CAPE FALCON.

If, as Mr. Dell apparently concedes, the industry standard for allocating longlining expenses and shares as set forth in the Set Line Agreement would not be considered a lease agreement, the inquiry should be whether Mr. Dell's agreement to supply the longline gear, combined with his receipt of a greater than normal portion of the boat share, converts the standard arrangement into a lease. If we look only to the *form* of the agreement between the parties, the answer would have to be negative. The parties never expressed an intent to alter their arrangement from the terms of the Set Line Agreement other than the fact that Mr. Dell provided, and was to be compensated for, the gear. The parties never purported to negotiate an entirely different form of lease arrangement for the F/V CAPE FALCON.

However, the National Marine Fisheries Service recognizes that, notwithstanding the language used by the parties, their arrangements may be characterized as leases for the purposes of the IFQ regulations. If, in *substance,* the arrangement had the characteristics of a lease as opposed to an owner/hired skipper relationship, the Service will recognize the relationship as a lease for the purposes of the IFQ regulations. This remainder of this Discussion applies the O'Rourke factors as the framework for determining whether the parties' arrangement was, in substance, a lease for the purposes of the IFQ regulations.

A. Did Mr. Dell have Possession and Command of the Vessel and Control of Navigation of the Vessel?

As discussed above, whether the person operating the longline vessel is designated a hired skipper or a lessee, that person typically has possession and control of the vessel and its navigation. Mr. Kristovich does not deny that Mr. Dell had full possession and command of the F/V CAPE FALCON during the relevant times. There is no evidence of Mr. Kristovich placing any significant restriction on Mr. Dell's operation or navigation of the F/V CAPE FALCON. He provided logbooks that were helpful to Mr. Dell in locating promising areas to fish for halibut. However, this fact alone does not detract from Mr. Dell's control and command of the vessel.

B. Did Mr. Dell Direct the Fishing Operations of the Vessel?

Similarly, the evidence established that Mr. Dell directed the fishing operations during the time he ran the F/V CAPE FALCON. There is no evidence that any person other than Mr. Dell decided the areas to fish, when to set and pull the lines, and other details of the fishing operations.

C. Did Mr. Dell Have the Right to Hire, Fire, and Pay the Crew?

Mr. Dell has conceded that the captain of a vessel generally has the right to hire and fire crew, whether or not there is a lease. The evidence established that Mr. Dell hired and fired the crew during the time he operated the F/V CAPE FALCON. Although some of his crew members had previously fished on the F/V CAPE FALCON with Mr. Kristovich, there is no evidence that any crew member was actually hired by Mr. Kristovich for longlining during the trips at issue.

Mr. Dell used Mr. Kristovich's form crew contracts that were on board the F/V CAPE FALCON. These contracts were similar, but not identical, to other form agreements used in the industry. However, Mr. Kristovich apparently did not require Mr. Dell to use those form agreements. He testified that he had no control over how Mr. Dell paid his crew. [Tape 2, side 2: 371].

Mr. Kristovich fired one crew member who had been hired by Mr. Dell. Mr. Kristovich fired Mr. Dell's brother, John Dell, after he saw John Dell board the vessel in what he believed was an inebriated state. However, it appears that the event occurred after the termination of the longline season in 1991.[20] Mr. Dell testified that he believed that Mr. Kristovich had breached their agreement by firing his crew member, and accordingly terminated the arrangement. Mr. Kristovich, on the other hand, asserts that he fired Mr. Dell. Either way, the fact that Mr. Kristovich fired a crew member after the termination of the longlining season would not support a finding that Mr. Kristovich had the right to fire the crew during the periods that Mr. Dell ran the F/V CAPE FALCON.[21]

Whether Mr. Dell or Mr. Kristovich paid the crew of the F/V CAPE FALCON during the times at issue relates to the larger questions of which party should be credited with any of the expenses paid from the fishing proceeds of the F/V CAPE FALCON and whether tax documents reflect whose business this was. Those questions are explored more fully in the following sections.

D. Was Mr. Dell Responsible for the Operating Expenses of the Vessel?

The question of who was *responsible* for operating expenses of the vessel is determined from the agreement between the parties and the crew. As discussed above, their agreement was modeled on the Set Line Agreement, except for the fact that Mr. Dell received a gear share and contributed gear to

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[20]There is some confusion as to when this event occurred. According to Mr. Kristovich's testimony, it occurred in September, 1990. However, Mr. Dell's recollection that the event occurred after the 1991 season is supported by evidence that John Dell continued to work on the F/V CAPE FALCON in 1991.

[21]There is conflicting evidence on whether Mr. Kristovich had the right to, or did, fire Mr. Dell. I find that the relationship, however it is characterized, was terminable at will. It apparently ended acrimoniously, but with the mutual consent of the parties.

the venture and the separate deduction from the gross for insurance. The parties clearly expected that the expenses of the venture would be paid from the fishing proceeds; Mr. Kristovich expected that he would be reimbursed for insurance payments from the 3 percent taken off the top; he expected to be reimbursed for his investment in the vessel and its associated costs from the boat share; Mr. Dell expected to be reimbursed for his contribution of gear from the gear share; the parties expected that operating expenses such as fuel, bait, groceries and lost gear would be paid from the fishing revenues; they expected the crew would be paid from the net proceeds. Thus, the question of who was *responsible* for the various expenses is difficult to answer. The parties essentially expected the fishing revenues to pay for the various expenses. The parties differ as to who should be deemed to have owned those revenues and to have made distributions from the revenues to pay expenses.

A more fruitful inquiry in determining which of the parties acted as an entrepreneur in the enterprise is who *paid* the expenses prior to being reimbursed from the fishing proceeds. Even if that person fully expected and was entitled to reimbursement, that person surely bore the risk of the venture in the event no fish were caught, the boat sank, and the other parties to the venture became insolvent. That person also made the capital contributions without which the venture could not have launched.

Mr. Kristovich set up a bank account with the National Bank of Alaska in the name of the F/V CAPE FALCON and John Kristovich. This account was used for various expenses of the F/V CAPE FALCON, both in longlining and other fisheries. Prior to each fishing season, he placed funds in the F/V CAPE FALCON account to cover sundry expenses.

After Mr. Kristovich and Mr. Dell agreed that Mr. Dell would run the F/V CAPE FALCON, Mr. Kristovich had Mr. Dell added as a co-signer on the F/V CAPE FALCON account. Mr. Dell was permitted to write checks from that account to pay for supplies, grub, fuel and bait. [Ex. 102, at 4]. In addition, Mr. Dell made gear purchases using the account. [Ex. 150, at 49]. When he purchased items for the vessel with cash, he reimbursed himself from the account. [Ex. 150, at 48]. Copies of check register, checks and deposit slips during the relevant time periods show that the account was used for expenses relating to the longlining fisheries at issue in this case. Mr. Dell concedes that the "majority of operational expenses while RAYMOND DELL was running the CAPE FALCON were paid out of the National Bank of Alaska/CAPE FALCON account (which Mr. Dell contends should be attributed to him). [See Respondent Dell's Post-Hearing Memorandum].

Before the time periods at issue, Mr. Kristovich used Shuham, Milner, Schafer, and Howard, CPAs (Shuham, Milner) as his accountants to handle fish settlements. When the captain, whether it was Mr. Kristovich, his son, or Mr. Dell, received proceeds from the fish processor, he would send the check to Shuham, Milner, which then put the proceeds in a trust account. Shuham, Milner then made appropriate distributions from that account. [Ex. 102, at 5]. When Mr. Dell operated the F/V CAPE FALCON, he gave the accountants instructions on the distributions of the fishing proceeds. Except for

the need for special instructions about gear and the payment of the 15 percent share to Mr. Dell, the Shuham, Milner settlements for the trips at issue apparently did not differ from prior accounting done for Mr. Kristovich. Copies of checks from the Shuham, Milner trust account and deposit slips from the F/V CAPE FALCON account show that the trust account regularly reimbursed the F/V CAPE FALCON account for trip expenses.

Both parties claim that they should be credited with the expenditures made from the F/V CAPE FALCON account and payments to that account from the fishing proceeds. Mr. Dell contends that the fishing proceeds belonged to him, and consequently he was the one who paid all the expenses. Mr. Kristovich contends that the payments made from the accounts were done within the scope of Mr. Dell's agency as the hired captain.

I find Mr. Kristovich's contentions more persuasive. The F/V CAPE FALCON account was arranged and funded by Mr. Kristovich before the longline fisheries at issue in this case. Amounts paid into and from that accounts are more properly characterized as funds relating to Mr. Kristovich's ongoing business operation of the F/V CAPE FALCON. The account did not become a part of Mr. Dell's business for the periods that Mr. Dell operated the vessel and was permitted to use the account.

Although, in theory, Mr. Dell could have set up a bank account in his own name for the F/V CAPE FALCON and made the initial outlays for the venture from that account, he could not have done so if he lacked the funds to capitalize the venture. The evidence in this case strongly suggests that Mr. Dell could not have capitalized the longline fishing venture on his own. Indeed, the arrangement between the parties and between Mr. Dell and Mr. Torgerson assured that Mr. Dell's capital outlay was minimal.[22]

Both parties have presented argumentative exhibits that purport to summarize the contributions each made to the F/V CAPE FALCON account. The exhibits reflect the parties' positions regarding who should be given credit for making payments and deposits. For example, Mr. Dell made payments for groceries from the F/V CAPE FALCON account. He apparently then reported those payments to Shuham, Milner. Shuham, Milner deducted that amount from the adjusted gross stock. Taking the June 6, 1991 settlement as an example, the amount deducted for grub was $691.38. [Ex. 12, at A-14]. Shuham, Milner then reimbursed the F/V CAPE FALCON account in that amount. [Ex. 150, at 113]. Mr. Dell credits himself with paying for the grub, and also with making the deposit towards the F/V CAPE FALCON account. [Ex. 151]. However, this reasoning is somewhat circular. It does not reflect amounts paid, either to the account or to the grocer, by Mr. Dell out of his own pocket. A more

[22]The finding in the IAD that Mr. Dell obtained financing for the venture is not supported by the evidence. Had Mr. Dell actually obtained formal financing and incurred debts in his own name he would have appeared more like an entrepreneur. However, there is no evidence of any debts of the ventures at issue that were not incurred in the name of the vessel or secured by its fishing proceeds.

accurate characterization is that Mr. Dell, as Mr. Kristovich's agent, bought the groceries using Mr. Kristovich's checking account, and then had that account reimbursed out of the fishing proceeds.

In any event, it is not disputed that Mr. Dell could freely use the F/V CAPE FALCON so long as he "zeroed" the account out at the end of the time he ran the F/V CAPE FALCON. Mr. Dell testified in his affidavit, "I was required to fund this account as necessary to pay my agreed share of costs." [Ex. 38, at 3]. Mr. Dell could take cash from the account, [Ex. 150, at 98], or from trust fund reimbursement payments to the account, so long as the balance was correct at the end of the fishery. [Ex. 150, at 73]. The fact that Mr. Dell had this power did not alter the essential nature of the F/V CAPE FALCON account.

I find that all expenses paid out of the F/V CAPE FALCON account are expenses paid by Mr. Kristovich. The IAD was in error in attributing expenses paid from the F/V CAPE FALCON account to Mr. Dell. The RAM Division apparently was unaware that the amounts that Mr. Dell claimed he paid were, in fact, paid from an account owned by the owner of the vessel.

The documentary evidence establishes that Mr. Kristovich paid the P&I insurance premiums and dues. Mr. Kristovich and his accountant testified that the 3 percent taken off the top only partially reimbursed him for P&I protection dues that he paid. [Ex. 102, at 6]. Moreover, had the fishing ventures not been successful, Mr. Kristovich would have still paid the insurance premiums and dues without any right to compensation from the fishing proceeds. Mr. Dell's assertion that he paid for insurance is not supported by the evidence. Indeed, Mr. Dell admitted that he had no concerns about insurance, and he assumed he was covered by the policies purchased by Mr. Kristovich.

Mr. Kristovich purchased the licenses and permits for the F/V CAPE FALCON, and Mr. Dell purchased his gear card, which must be presented by the operator (or another person on board the vessel) to sell sablefish and halibut. Mr. Dell submitted no evidence supporting his claim that he reimbursed Mr. Kristovich for any permit or license expenses, and I find he did not.

Mr. Kristovich contends he paid for all repairs and maintenance to the F/V Cape Falcon. [Ex. 101, at 16; Ex. 102, at 10]. Mr. Kristovich produced copies of invoices and checks of thousands of dollars for each of the years in question evidencing his payments for these costs and other miscellaneous expenses associated with the F/V CAPE FALCON. [Ex. 114-15]. Although most of the vessel maintenance was done during winter layups in Seattle, these payments include the months that Mr. Dell ran the F/V CAPE FALCON and include expenses relating to longlining.

Mr. Dell contends that he paid for repairs and maintenance. He submitted several invoices to support his contention. On cross examination, Mr. Dell conceded that some receipts he had submitted as evidencing repairs were likely gear costs. The amount of the invoices that could be attributed to Mr.

Dell is de minimis compared to Mr. Kristovich's expenses. There is no evidence that the parties agreed that Mr. Dell would pay repairs and maintenance. Mr. Dell testified that this was his "understanding." However, he did not testify that it was actually agreed to. Accordingly, I find that, although the evidence could support a finding that Mr. Dell made certain minor purchases for the vessel, Mr. Kristovich was the individual who bore the large expense of maintaining, repairing, and equipping the vessel.

Mr. Dell did bear some of the cost of the initial longline gear carried on the F/V CAPE FALCON during the times at issue. Mr. Dell obtained longline gear from Duane Torgerson. [Ex. 102, at 3; Ex. 38, at 5]. Mr. Dell testified that he had been living in Mr. Torgerson's home rent-free in exchange for his labor. Mr. Torgerson supplied used longline gear under the same terms. Mr. Dell contended that he made other gear purchases with his own funds. He identified two receipts for gear purchased in January, 1989 from his own checking account. However, those receipts are de minimis compared to the gear expenses paid from the F/V CAPE FALCON account.

Copies of checks from the F/V CAPE FALCON account show significant gear purchases on that account, including gear invoices Mr. Dell contends he paid. [Ex. 150, at 10; compare ex. 150, at 34 with Ex. 47, 6/16/89 invoice from North Pacific]. Moreover, Mr. Kristovich contends that he provided some longline gear, anchors, lights, and buoys, for the F/V Cape Falcon in 1989, which should have been, but were not returned. [Ex. 102, at 4]. Mr. Dell contends that he returned or replaced this gear. [Ex. 38, at 5]. Mr. Kristovich also provided some gear that was not specifically for longlining. For example, he testified that he furnished the survival and rescue gear. [Tape 2, side 1: 252].

Although the parties' agreement was that Mr. Dell was to provide gear for the venture, the evidence shows that Mr. Dell incurred very little out-of-pocket expense in the initial gear for the vessel. Assuming that Mr. Dell reimbursed the F/V CAPE FALCON account and replaced or returned gear provided by Mr. Kristovich, he still had little initial financial outlay. Apparently, as was the parties' intent, Mr. Dell obtained gear from the crew as the initial gear was lost or condemned. Mr. Dell kept the gear when he and Mr. Kristovich parted company.

After carefully reviewing the evidence[23] I find that, taking all expenses associated with the operation of

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[23]Space does not allow a detailed discussion of every invoice, check, deposit record or party assertion regarding payment of expenses. I have relied principally on the documents, as the parties' recollection of events has not always proven to be accurate. For example, Mr. Dell testified confidently that he had paid for a Loran that the documents establish was actually purchased by Mr. Kristovich. Various statements by Mr. Dell regarding what purchases he made cannot be credited, as he attributes to himself purchases he made using Mr. Kristovich's checking account. Mr. Kristovich has admitted that his recollection, particularly of the sequence of events, is flawed due to a stroke he recently suffered.

the F/V CAPE FALCON during the time periods at issue into account, Mr. Kristovich's capital investment dwarfed Mr. Dell's, even without taking into account the major investment in the vessel itself.

E. Did Mr. Dell Treat the Fishing Operations in Which the Vessel Was Used as His Own Business?

The pivotal issue in this appeal is whether the fishing operations on the F/V CAPE FALCON during the time it was operated by Mr. Dell should be characterized as Mr. Dell's business or Mr. Kristovich's business.

Mr. Dell treated the fishing operations at issue as his own business for the purposes of his income tax returns. He declared the income that he received from the fish processors when he sold the fish on his gear card. He also took the deductions for crew payments and other expenses, including the boat share that he sent to Mr. Kristovich. In 1989, the 1099 forms for the crew were issued in the name: "Ray Dell". [Ex. 50]. In 1990, the 1099 forms issued to the crew were issued in the name: "Dell, Ray - Captain F/V CAPE FALCON." [Ex. 50]. In 1991, the 1099 forms issued to the crew were issued in the name: "F/V CAPE FALCON, Ray Dell, Captain."

Mr. Kristovich's tax returns listed income and expenses relating to the F/V CAPE FALCON. Mr. Kristovich's 1990 and 1991 tax returns attached settlement and checking account summaries that include the time periods and trips at issue. Although the documentation is unclear, as both Mr. Kristovich and Mr. Dell had fishing ventures other than those at issue, the testimony clarified what income and expenses were reported on the parties' returns. Mr. Kristovich's reporting of income on his Schedule C forms relating to "Fishing Salmon, Halibut" for the "F/V Cape Falcon" did not include the gross fishing receipts but only the boat share and insurance reimbursement received by Mr. Kristovich from the Shuham, Milner trust account.

Shuham, Milner prepared the settlements at issue, and also prepared the tax returns of both the Dells and the Kristoviches during the years at issue. Scott Milner testified in an affidavit that payments of expenses, including crew shares, were attributed on tax forms to the captain who sold fish on his gear card, as this avoided confusion with the IRS about proper deductions. This apparently was the standard procedure even when there is no allegation that the owner leased the vessel to the captain who sold the fish. John M. Kristovich (Mr. Kristovich's son) testified that, although he was the captain and not the lessor of the F/V MISS BLU, the same accountant issued the 1099 forms to the crew of the F/V MISS BLU in his name instead of Mr. Kristovich's name.

Scott Milner testified as follows:

> Raymond Dell ran the CAPE FALCON during the years 1989 through 1991. During that period, all tax preparation and fishing trip settlements were prepared as they are customarily prepared for a vessel owner/separate captain relationship.
>
> The person that operates a longline vessel must, by regulation, be the person whose name is on the State of Alaska fishing permit. Because all of the fish tickets are issued in the permit holder's name, in order to not confuse the IRS, we report all the gross fishing income through the name of the permit holder. As the permit holder and the person to whom the fish tickets are issued, to avoid confusion with the IRS, the gross longline fishing income must be recognized on the captain's tax returns. Because the captain recognizes the gross income, the gross trip expenses for the fishing operation must also be allocated to the captain on his tax returns.
>
> Accordingly, even though he was only operating the vessel for the vessel owner, we listed the captain, Raymond Dell, as the "Payer" on the 1099s issued to the crew members for the 1989 longline season.

[Ex. 117, at 3].

Although the opinion of the accountant as to whether the relationship between Mr. Kristovich and Mr. Dell constituted a "lease" for the purposes of the IFQ regulations is not material, the testimony of the accountant is persuasive evidence that, regardless of whether there was an owner/hired skipper or a lessor/lessee relationship, the tax and accounting documents would have been prepared in the same way. Therefore, I accord little weight in this case to the tax documents.

I find that, during the relevant time periods, both Mr. Kristovich and Mr. Dell treated the operation of the F/V CAPE FALCON as their own business in many respects. However, I find that the operation of the F/V CAPE FALCON remained, in essence, Mr. Kristovich's business enterprise, with Mr. Dell acting as a trusted agent. I believe that, had the parties intended that Mr. Dell start his own business and lease the F/V CAPE FALCON from Mr. Kristovich, the terms of the arrangement would have looked very different. In particular, it would have been unusual for Mr. Kristovich to hand over his checkbook to Mr. Dell in the type of "arms-length" arrangement Mr. Dell describes.

F. Was the Claimed Lease for a Set Term?

Mr. Dell concedes that the arrangement had no set term: Mr. Dell stated that the term of the lease was "so long as I wanted to remain in the longline fishery. Either JOHN KRISTOVICH or I could have terminated the lease at any time with sufficient notice prior to any upcoming fishery." [Ex. 38, at 11-12]. Mr. Dell testified at the oral hearing that he and Mr. Kristovich did not discuss the date the vessel was to be returned to Mr. Kristovich, but that in his mind, he knew that Mr. Kristovich would need the

boat back in time to pursue the salmon fishery in July. Mr. Kristovich contended that he had the authority to fire Mr. Dell at any time. [Ex. 102, at 9]. I find that the arrangement had no fixed term.

In sum, applying the O'Rourke factors to the facts, upon *de novo* review of the administrative record, I find that, in both form and substance, the parties' arrangement does not have the essential traits of a lease. Instead, Mr. Dell's actions in running the F/V CAPE FALCON and paying expenses was done as an agent of Mr. Kristovich.

FINDINGS OF FACT

During the periods April 1 through July 10 of 1989, 1990, and 1991:

1. Raymond Dell had possession and command, and control of the navigation, of the F/V CAPE FALCON; directed the vessel's fishing operations; hired and paid the crew; and had the right to fire the crew;

2. John A. Kristovich paid for the major operating expenses of the vessel, including insurance, repair, maintenance, and equipment;

3. The operation of the F/V CAPE FALCON remained, in essence, Mr. Kristovich's business enterprise, with Mr. Dell acting as Mr. Kristovich's trusted agent; and

4. The arrangement between Mr. Kristovich and Mr. Dell had no fixed term, and could have been terminated at will by either party.

CONCLUSION OF LAW

1. Raymond Dell did not hold a vessel lease of the F/V CAPE FALCON in 1989, 1990, or 1991.

2. Qualifying pounds resulting from landings of halibut and sablefish made from the F/V CAPE FALCON during 1989, 1990, and 1991, should be allocated to John A. Kristovich

DISPOSITION AND ORDER

The Division's initial administrative determination, dated January 5, 1995, involving a conflict between the John Kristovich and Raymond Dell over the allocation of qualifying pounds of halibut and sablefish landed from the F/V CAPE FALCON is VACATED. The Division is directed to award the disputed quota share to John A. Kristovich. This decision takes effect on April 19, 1996, unless by that date the Regional Director orders review of the decision.

Rebekah R. Ross
Appeals Officer

I concur in the factual findings of this decision and I have reviewed this decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

Because the prevailing party in this appeal, John A. Kristovich, can still receive QS and the corresponding IFQ for the 1996 season, I recommend that the Regional Director expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

Randall J. Moen
Appeals Officer