

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 95-0023
)	
PATRICK SELFRIDGE,)	DECISION
Appellant)	
_____)	September 3, 1998

STATEMENT OF THE CASE

Appellant Patrick Selfridge filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program¹ [RAM] of the National Marine Fisheries Service [NMFS] on January 17, 1995. The IAD denied his application for halibut Quota Share [QS] under the Individual Fishing Quota [IFQ] program because he failed to show that he had made legal landings of halibut during a QS qualifying year, 1988, 1989, or 1990. Mr. Selfridge's interests are directly and adversely affected by the IAD. No hearing was held because the facts are not in dispute.

ISSUES

1. Whether halibut QS can be issued on the basis of hardship or unavoidable circumstance, due to the loss of a vessel at sea.
2. Whether halibut QS can be issued on the basis of oral assurances made by the drafters of the IFQ regulations.
3. Whether Mr. Selfridge can receive halibut QS, based on landings of halibut made during 1984-1987, because he is qualified for sablefish QS.

BACKGROUND

Mr. Selfridge fished commercially for many years for halibut and sablefish off Alaska prior to the loss of his vessel, the F/V ANIAK, which sank in heavy seas in the eastern Gulf of Alaska on April 16, 1988. He made sablefish landings early in 1988, and halibut landings from 1984-1987. He made no halibut landings during the QS qualifying years of 1988, 1989, or 1990.²

¹The Restricted Access Management Division was renamed Restricted Access Management Program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

²RAM's records show that Mr. Selfridge made landings of halibut from the F/V UNIMAK between 1984 and 1987.

RAM approved Mr. Selfridge's application for sablefish QS, but rejected his application for halibut QS because of the absence of halibut landings during the QS qualifying period.

Mr. Selfridge claims halibut QS on the basis that: (1) he lost his vessel and made good faith efforts to replace it; (2) the "IFQ drafting team" orally assured him that he would be awarded halibut QS; and (3) under IFQ regulations, an applicant who qualifies for sablefish QS is automatically qualified to receive credit for halibut landings made only during the QS base years.

DISCUSSION

To qualify for QS under the regulations of the IFQ program, a person must show that landings of halibut or sablefish were made during a QS qualifying year.³ The regulations provide:

(a) General. The Regional Administrator shall initially assign to qualified persons, ... halibut and sablefish fixed gear fishery QS that are specific to IFQ regulatory areas and vessel categories. . . .

(2) Qualified person. (i) As used in this section, a "qualified person" means a "person," as defined in § 679.2:

(A) That owned a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year. . . . [emphasis supplied]

1. Whether halibut QS can be issued on the basis of hardship or unavoidable circumstance, due to the loss of a vessel at sea.

RAM's records show that Mr. Selfridge did not own or lease a vessel that made halibut landings during a QS qualifying year. He claims that he would have made halibut landings during that period of time, had it not been for the loss of his vessel.

This Office has ruled in several decisions that QS may be issued only on the basis of actual, not hypothetical, landings.⁴ The regulations governing the issuance of QS clearly require actual landings, and provide for no exceptions to this rule. The North Pacific Fishery Management Council [Council] in

³See, 50 C.F.R. § 679.40(a)(2), formerly 50 C.F.R. § 676.20(a)(1).

⁴See Kenneth M. Adams, Appeal No. 95-0004, March 22, 1995; William E. Crump, Appeal No. 95-0024, June 27, 1995; Jimmy D. Hutchens, Appeal No. 95-0094, June 28, 1995, *aff'd*, January 1, 1996; and Michael C. Hatten, Appeal No. 95-0136, January 30, 1996, *aff'd*, January 18, 1996. In all of these cases, the Appellants argued that they would have made landings, but for the EXXON VALDEZ oil spill.

1994 rejected a proposal to create an exception that would have provided for the issuance of compensatory QS on the basis of hardship or unavoidable circumstance.⁵ Therefore, I conclude that halibut QS cannot be issued to Mr. Selfridge on the basis of the loss of his vessel and his good faith efforts to replace it during the QS qualifying years.

2. Whether halibut QS can be issued on the basis of oral assurances made by the drafters of the IFQ regulations.

Mr. Selfridge asks that halibut QS be issued to him because of alleged oral assurances from the drafters of the IFQ regulations that the IFQ program “would take specific account of fishermen like him who had extensive past participation in the fishery and the plan would ensure that he qualified for black cod and halibut quota shares.” He states that he was assured he would not need to replace his fishing vessel immediately; that the loss of his vessel in 1988 would not prevent him from obtaining halibut QS. [Appeal, ¶8] Mr. Selfridge further asserts that he relied in good faith on these representations by the regulatory drafters. [Appeal, ¶9]

This argument is essentially a claim of equitable estoppel against the United States government, that NMFS should be estopped from denying Mr. Selfridge’s eligibility for halibut QS, despite the IFQ regulations, because of the oral representations alleged to have been made by NMFS employees. The general rule is that reliance on misinformation provided by government employees does not provide a basis for estoppel.⁶ In addition, estoppel against the government cannot be premised on oral representations.⁷ Furthermore, the United States is neither bound nor estopped by representations made by persons without authority to bind the government.⁸

Mr. Selfridge does not specify who made the alleged representations to him, or where or when they were made. Because he asserts that the representations were made by “members of the nascent IFQ program drafting team,” I presume he is alleging that the representations were made during the regulatory drafting stage, before the final IFQ rule was published. Persons on the “drafting team” do not have authority to bind the government to provide special treatment or exceptions for Mr. Selfridge, contrary to the published regulations. In addition, these alleged representations were oral, and thus not

⁵See, the Council's Newsletter (10/20/94), reporting on the Council’s vote at its September 28-October 5, 1994, meeting.

⁶See, e.g., Crown v. United States Railroad Retirement Bd., 811 F.2d 1017 (C.A.7, 1987); Gressley v. Califano, 609 F.2d 1265 (C.A.7, 1979).

⁷Heckler v. Community Health Services of Crawford Co., 467 U.S. 51, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984).

⁸United States v. Zorger, 407 F. Supp. 25 (W.D. Pa., 1976).

binding on the government. Finally, as we stated in Prowler Partnership v. Samuelson, “the agency cannot be bound by statements that were allegedly made before the IFQ program and the IFQ regulations were adopted. . . . [D]eterminations regarding the allocation of qualifying pounds and the issuance of Quota Shares are governed by the IFQ regulations . . .”⁹ Therefore, I must conclude that halibut QS cannot be issued to Mr. Selfridge based on the alleged oral assurances.

3. Whether Mr. Selfridge can receive halibut QS, based on landings of halibut made during 1984-1987, because he is qualified for sablefish QS.

RAM denied Mr. Selfridge's claim for halibut QS because he had not made halibut landings during a QS qualifying year.

On appeal, Mr. Selfridge claims that the definition of “qualified person” in the IFQ regulations provides that a person need only qualify for one species (halibut or sablefish) in order to receive QS for the landings of both species. Mr. Selfridge claims that because he is qualified for sablefish QS, as a result of sablefish landings he made in 1988, he is thereby eligible to receive IFQ credit for the halibut landings he made between 1984-1987, the halibut QS base period. Mr. Selfridge focuses on the language of the definition that states that a “qualified person” means a person that owned a vessel that made legal landings of halibut or sablefish.

Seven months after the filing of Mr. Selfridge's appeal, NMFS issued an interpretive rule to clarify the definition of “qualified person.”¹⁰ Because the interpretive rule was adopted after this appeal was filed, and was not in effect at the time of Mr. Selfridge’s application for QS, there is an issue whether the rule should be given retroactive effect.

By law, an agency's interpretive rule of an existing regulation may be given retroactive effect if it continues a position consistently held by the agency, and if it does not add new meaning to the agency's existing interpretation.¹¹

The supplementary information published with the interpretive rule indicates that the rule was issued to clarify NMFS’s consistent practice of determining the qualifications for the IFQ program, and that the rule does not change the agency's existing interpretation of the regulations.

⁹Appeal No. 95-0084, November 8, 1995, at 10, *aff'd*, March 12, 1996.

¹⁰60 Fed. Reg. 58,528 (November 28, 1995).

¹¹*See, Anderson, Clayton & Co. v. U.S.* 562 F.2d 972 (5th Cir. 1977), *cert. denied*, 436 U.S. 944; *see also*, Kenneth Culp Davis, *Administrative Law Treatise*, § 7:23 (2d ed. vol.2, 1979 & Supp. 1989), for an overview of cases and discussion of the validity of retroactive rules.

The IFQ program regulations governing the halibut fishery pertain exclusively to Pacific halibut: IFQ Program regulations governing the sablefish fishery pertain exclusively to sablefish. As is evident from the administrative record of the IFQ Program's development, the Council intended to create two clearly distinguished limited access systems: one for the halibut fixed gear fishery and one for the sablefish fixed gear fishery. . . .

This interpretive rule simply restates NMFS' consistent practice in determining eligibility for halibut QS and sablefish QS.¹²

The historical record of the IFQ program shows that the Council intended two clearly distinguished limited access systems; one for the halibut fixed gear fishery and another for the sablefish fixed gear fishery.

In response to the question, "To whom shall QS be allocated," NMFS concluded:¹³

Initial assignments of halibut QS shall be made to each person who owned or leased a vessel with legal fixed gear halibut landings from off Alaska for 1988 through 1990. Similarly, initial assignments of sablefish QS shall be made to each person who owned or leased a vessel with legal fixed gear sablefish landings from the EEZ off Alaska for 1988 through 1990.

From the outset of the IFQ program, RAM has treated the halibut fishery and sablefish fishery separately during the application process for QS purposes. All QS applicants were issued separate applications for halibut QS and sablefish QS,¹⁴ separate QS Data Summaries, separate notices of insufficient documentation and, in most instances, separate IADs. Any applicant not qualifying for halibut QS was not given halibut QS, nor was an applicant given sablefish QS without qualifying for sablefish QS. There is no evidence that suggests that Mr. Selfridge, or any other applicant, was led to believe anything different.

It is clear from the history and implementation of the IFQ program that the Council intended two separate programs for QS — one for halibut, another for sablefish. It is also clear that RAM has consistently required applicants to qualify separately for each species. Given that the interpretive rule conforms to the Council's intent, as well as RAM 's long-standing and consistent implementation of the

¹²See, 60 Fed. Reg. 58,529 (November 28, 1995).

¹³See, the NMFS Final Environmental Impact Statement to the IFQ program, September, 15, 1992, at 2-22.

¹⁴See the IFQ Application Information packet for QS applications, at 1.

IFQ program, I conclude that the interpretive rule can be retroactively applied.

Therefore, because Mr. Selfridge made no landings of halibut during the QS qualifying period, I conclude that he may not receive halibut QS, irrespective of the fact that he is qualified for sablefish QS.

FINDINGS OF FACT

1. Mr. Selfridge made no halibut landings during a QS qualifying year.
2. NMFS' interpretive rule is consistent with RAM's long-standing practice to require applicants for QS to qualify separately for halibut QS and sablefish QS.

CONCLUSIONS OF LAW

1. QS may not be issued on the basis of hardship or unavoidable circumstances, due to the loss of a vessel at sea.
2. The doctrine of equitable estoppel against the government does not apply in this case.
3. This Office, as well as the NMFS, is bound by the language of duly promulgated regulations adopted by the Council, not assurances allegedly made by the drafters of IFQ regulations before the creation of the IFQ program.
4. Mr. Selfridge may not be issued QS on the basis of (alleged) oral assurances by the drafters of the IFQ regulations.
5. NMFS' interpretive rule that requires a person to qualify separately for halibut QS and sablefish QS, may be retroactively applied.
6. Mr. Selfridge is not qualified for halibut QS, even though he is qualified for sablefish QS.

DISPOSITION

RAM's IAD, denying Mr. Selfridge's application for halibut QS, is **AFFIRMED**. This decision takes effect on October 5, 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 the tenth day after the date of this Decision, September

14, 1998. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion.

James Cufley
Appeals Officer

Randall J. Moen
Appeals Officer