

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0041
	)	
BOGGS ENTERPRISES, INC.,	)	DECISION
Appellant	)	
_____	)	July 11, 2000

STATEMENT OF THE CASE

Appellant Boggs Enterprises, Inc., (Boggs) filed a timely appeal of an Initial Administrative Determination (IAD) issued by the Restricted Access Management (RAM) program<sup>1</sup> on January 17, 1995, and of a Determination Upon Reconsideration (Reconsideration) issued by RAM on May 31, 1995. The IAD and the Reconsideration denied Boggs' request to have its sablefish quota share (QS) under the Pacific halibut and sablefish Individual Fishing Quota (IFQ) program reassigned from vessel category C to vessel category A.

Boggs has adequately alleged that its interests are directly and adversely affected by the IAD and the Reconsideration. Boggs' request for a hearing was denied because the facts are not in dispute.<sup>2</sup>

ISSUE

Is Boggs entitled to have its sablefish QS reassigned from vessel category C to vessel category A?

BACKGROUND

Boggs and Hastings Enterprises, Inc., (Hastings) both owned the F/V MARY ELLEN, a 67-foot catcher/processor vessel. They last fished sablefish with the vessel in 1988, and neither Boggs nor Hastings fished sablefish again. They then sold the F/V MARY ELLEN to Palmer Pedersen Fisheries, Inc., (PPF) in 1990. In 1991, Boggs used the 48-foot F/V SALLY J to make legal landings of halibut.

RAM assigned Hastings' sablefish QS to vessel category A. RAM determined that the F/V MARY ELLEN was the last vessel used by Hastings to make legal landings of sablefish or

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

<sup>2</sup>See 50 C.F.R. § 679.43(g); formerly, 50 C.F.R. § 676.25 (g)(3). All IFQ regulations were renumbered, effective July 1, 1996. See 61 Fed. Reg. 31,270 (1996). The wording of the regulation in question was unchanged by the renumbering.

halibut between January 1, 1988, and September 25, 1991. The assignment of QS to vessel category A enables Hastings to harvest and process its sablefish QS on a vessel of any length.<sup>3</sup>

Even though Boggs' sablefish fishing history is the same as Hastings, RAM assigned Boggs' sablefish QS to vessel category C. RAM determined that the F/V SALLY J was the last vessel used by Boggs to make legal landings of halibut or sablefish between January 1, 1988, and September 25, 1991. The assignment of QS to vessel category C enables Boggs to fish its sablefish QS on a vessel with an LOA of 60 feet or less.<sup>4</sup>

Boggs wants to use the F/V ALASKA MIST to fish its sablefish QS. The F/V ALASKA MIST is a category A vessel. Boggs claims that its sablefish QS should be reassigned to vessel category A because it harvested, processed, and landed all of its sablefish from the F/V MARY ELLEN. Boggs claims that the assignment of its sablefish QS to vessel category C violates the IFQ regulations, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) and the due process and equal protection clauses of the U.S. Constitution. PPF states in its amicus brief that the vessel category C assignment interferes with its purchase of the fishing rights of the F/V MARY ELLEN in 1990.

#### PRINCIPLES OF LAW

1. The IFQ regulations require RAM to assign a qualified person's QS to one or more of vessel categories.<sup>5</sup>
2. Vessel categories are based on the product type [of fish] landed<sup>6</sup> and the length overall (LOA)<sup>7</sup> of vessels used by a qualified person to make legal landings of halibut or sablefish in the person's most recent year of participation.<sup>8</sup>

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<sup>3</sup>See C.F.R. § 679.40(a)(5)(ii)(A).

<sup>4</sup>See C.F.R. § 679.40(a)(5)(ii)(C).

<sup>5</sup>See C.F.R. § 679.40(a)(5).

<sup>6</sup>The "product type landed" refers to the condition of the halibut or sablefish at the point the fish is weighed and recorded. For purposes of assignment of QS to a vessel category, a qualified person's QS will be assigned to vessel category A if the person's vessel landed processed fish in the person's most recent year of participation.

<sup>7</sup>The "LOA" of a vessel is defined in 50 C.F.R. § 679.2.

<sup>8</sup>See 50 C.F.R. § 679.40(a)(5)(I), which reads in relevant part: "Each qualified person's QS will be assigned to a vessel category based on the LOA of vessel(s) from which that person made fixed gear legal landings of groundfish or halibut in the most recent year of participation and the product type landed."

2. The “most recent year of participation” is the qualified person’s last year of fishing for halibut or sablefish between January 1, 1988, and September 25, 1991.<sup>9</sup>
3. A qualified person’s sablefish QS must be assigned to vessel category C if the vessel used in the person’s most recent year of participation was less than or equal to 60 ft (18.3 m) LOA and did not process any groundfish or halibut caught with fixed gear.<sup>10</sup>
4. A qualified person's QS must be assigned to vessel category A if the vessel used during the person’s most recent year of participation processed any groundfish or halibut caught with fixed gear.<sup>11</sup>

## DISCUSSION

Boggs fished and landed sablefish from the catcher/processor vessel, the F/V MARY ELLEN, in 1988. Boggs also fished and landed halibut from the catcher vessel, the F/V SALLY J, in 1991.<sup>12</sup> The F/V MARY ELLEN was the last vessel used by Boggs to fish and land sablefish between January 1, 1988, and September 25, 1991. The F/V SALLY J was the last vessel used by Boggs to fish and land halibut during that same period of time. The F/V MARY ELLEN is a category A vessel, and the F/V SALLY J is a category C vessel, for purposes of assigning QS to a vessel category under the IFQ program.

Boggs argues that the IFQ regulations require RAM to assign its sablefish QS to vessel category A because the F/V MARY ELLEN was the only vessel used by Boggs to fish and land *sablefish* between January 1, 1988, and September 25, 1991.

The IFQ regulations clearly require RAM to assign a qualified person’s sablefish QS to the vessel category used to land halibut or sablefish in the person’s last year of fishing of either species (halibut or sablefish) between January 1, 1988, and September 25, 1991. The IFQ regulations do not provide for a person’s sablefish QS to be assigned to the vessel category used only to fish and land *sablefish* between January 1, 1988, and September 25, 1991.

The IFQ regulations do not provide for an exception to this rule; nor am I empowered to create

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<sup>9</sup>Id.

<sup>10</sup>See 50 C.F.R. § 679.40(a)(5)(iv)(A), which reads: “A qualified person’s sablefish QS will be assigned: (A) To vessel category C if, at any time during his/her most recent year of participation, that person’s vessel was less than or equal to 60 ft. (18.3 m) LOA and did not process any groundfish or halibut caught with fixed gear.”

<sup>11</sup>See 50 C.F.R. § 679.40(a)(5)(iii)(A).

<sup>12</sup>Before September 26, 1991.

one. As an Appeals Officer, I am bound by the requirements of the IFQ regulations, and constitutional or legal challenges to those regulations are matters for the courts.<sup>13</sup> I note that the IFQ regulations were upheld by the federal court as a permissible exercise of the Secretary of Commerce's authority.<sup>14</sup> Therefore, I do not have authority to determine whether the assignment of Boggs's sablefish QS to vessel category C violates the Magnuson Act or the due process and equal protection clauses of the U.S. Constitution. In several IFQ decisions, we have ruled that the purchase of a vessel's fishing rights does not qualify a person for QS.<sup>15</sup> Therefore, PPF's claim that it purchased the fishing rights of the F/V MARY ELLEN is not relevant to this case (particularly to the assignment of Boggs's sablefish QS).

Therefore, I conclude that RAM correctly assigned Boggs' sablefish QS to vessel category C, even though it assigned Boggs' business partner's sablefish QS to vessel category A, and even though Boggs landed all of its sablefish from the F/V MARY ELLEN.

I conclude that Boggs is not entitled to have its sablefish QS reassigned from vessel category C to vessel category A.

#### FINDINGS OF FACT

1. Boggs fished and landed sablefish from the catcher/processor vessel, the F/V MARY ELLEN, in 1988.
2. Boggs fished and landed halibut from the catcher vessel, the F/V SALLY J, in 1991 (before September 26 of that year).
3. The F/V MARY ELLEN was the last vessel used by Boggs to fish and land sablefish between January 1, 1988, and September 25, 1991.
4. The F/V SALLY J was the last vessel used by Boggs to fish and land halibut during that same period of time.

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<sup>13</sup>See, e.g., Charles J. Petticrew, Appeal No. 95-0008, July 3, 1996; George Ramos, Appeal No. 94-0008, Regional Director's Decision on Review, at 4, April 21, 1995; Alaska Ocean Fisheries, Inc., Appeal No. 95-0116, September 30, 1999.

<sup>14</sup>See Alliance Against IFQs v. Brown, 84 F.3d 343 (9<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1185 (1997).

<sup>15</sup>See, e.g., Cadden v. Levenhagen and Pugh, Appeal No. 95-0013, January 17, 1996, *aff'd* January 18, 1996; Prowler Partnership v. Samuelson, Decision on Reconsideration (Part I), Appeal No. 95-0084, March 12, 1996, *aff'd* March 14, 1996; Alwert Fisheries, Inc., v. Oregon Seafood Producers and Dorothy Painter, Appeal No. 95-0073, March 21, 1996; James M. Anderson, Appeal No. 97-0012, October 29, 1999.

## CONCLUSIONS OF LAW

1. The F/V MARY ELLEN is a category A vessel, and the F/V SALLY J is a category C vessel, for purposes of assigning QS to a vessel category under the IFQ program.
2. The IFQ regulations clearly require RAM to assign a qualified person's sablefish QS to the vessel category used to land halibut or sablefish in the person's last year of fishing of either species (halibut or sablefish) between January 1, 1988, and September 25, 1991.
3. The IFQ regulations do not provide for a person's sablefish QS to be assigned to the vessel category used only to fish and land *sablefish* between January 1, 1988, and September 25, 1991.
4. As an Appeals Officer, I am bound by the requirements of the IFQ regulations, and any legal or constitutional challenges to those regulations are matters for the courts.
5. As an Appeals Officer, I do not have the authority to determine whether assignment of Boggs's sablefish QS to vessel category C violates the Magnuson Act or the due process and equal protection clauses of the U.S. Constitution.
6. PPF's claim that it purchased the fishing rights of the F/V MARY ELLEN is not relevant to this case.
7. RAM correctly assigned Boggs' sablefish QS to vessel category C, even though it assigned Boggs' business partner's sablefish QS to vessel category A, and even though Boggs landed all of its sablefish from the F/V MARY ELLEN.
8. Boggs is not entitled to have its sablefish QS reassigned from vessel category C to vessel category A.

## DISPOSITION

The IAD denying Boggs' request to reassign its sablefish QS from vessel category C to vessel category A is **AFFIRMED**. This decision takes effect on August 10, 2000, 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 the Decision, July 21, 2000. A Motion for Reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion.

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Randall J. Moen  
Appeals Officer