

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
)
JEFF W. HANSON,)
Appellant)
_____)
Appeal No. 95-0048
DECISION
June 3, 1999

STATEMENT OF THE CASE

Appellant Jeff Hanson filed a timely appeal of an Initial Administrative Determination [IAD], issued on January 16, 1998, by the Restricted Access Management [RAM] program.¹ RAM denied Mr. Hanson's claim that he is a qualified person for sablefish quota shares [QS] under the Individual Fishing Quota [IFQ] program. Mr. Hanson's interests are directly and adversely affected by the IAD. Although Mr. Hanson requested a hearing, no hearing was ordered because the record contains sufficient information on which to reach a final decision, and because there is no genuine and substantial issue of adjudicative fact for resolution.²

ISSUES

1. Is Mr. Hanson a qualified person for sablefish quota shares?
2. If Mr. Hanson is not a qualified person for sablefish QS, can he nonetheless receive an initial issuance of sablefish QS based on hardship or unavoidable circumstances?

DISCUSSION

1. Is Mr. Hanson a qualified person for sablefish quota shares?

To qualify for QS under the IFQ program, a person must have owned or leased a vessel that made at least one legal landing of sablefish or halibut, harvested with fixed gear, from any IFQ regulatory area during the QS qualifying period 1988-1990.³ Such a person is a "qualified person" for QS. The IFQ

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

²See, 50 C.F.R. § 679.43(g)(2) and (3); formerly, 50 C.F.R. § 676.25(g)(2) and (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.

³50 C.F.R. § 679.40(a)(2)-(3).

regulations further provide that the NMFS Regional Administrator shall calculate a qualified person's QS based on that person's highest total legal landings in each regulatory area for any five years between 1984-1990 for halibut and between 1985-1990 for sablefish.⁴

RAM determined that legal landings of halibut were made from Mr. Hanson's vessel, the F/V RONDOUT, during the QS qualifying period. Therefore, RAM determined that Mr. Hanson is a qualified person and awarded him an initial issuance of halibut QS.⁵ RAM also determined, and Mr. Hanson acknowledges, that no legal landings of sablefish were made from any vessels owned or leased by Mr. Hanson during the QS qualifying period.⁶ RAM, therefore, determined that Mr. Hanson is not a qualified person with respect to sablefish QS.

On appeal, Mr. Hanson argues that the regulation defines a qualified person as a person whose vessel made legal landings of *halibut or sablefish* during the QS qualifying period. He argues that the regulation does not say that an applicant must qualify for each species separately. Mr. Hanson reasons that because he is a qualified person for halibut QS he is automatically also a qualified person for sablefish QS, and that a fair reading of the regulations entitles him to receive IFQ credit for his sablefish landings made in 1987 from his vessel the F/V RONDOUT.

This argument has been made before without success. In Patrick Selfridge⁷ we concluded that that applicants for QS must qualify separately for halibut QS and sablefish QS. We based that conclusion on NMFS' consistent, long-standing practice of requiring applicants to qualify separately for each species and on a NMFS interpretive rule.⁸ Therefore, Mr. Hanson is not a qualified person for sablefish QS because no legal landings of sablefish were made from any vessels owned or leased by Mr. Hanson during the QS qualifying period, despite the fact that he is a qualified person for halibut QS and has received an initial issuance of halibut QS.

⁴50 C.F.R. § 679.40(a)(4).

⁵In its IAD in this case, RAM stated that Mr. Hanson "did not own or lease a commercial fishing vessel upon which legal landings of halibut or sablefish were made during any of the QS Qualifying Years (1988, 1989, or 1990); as a result, you are not eligible to receive QS by initial issuance." On appeal, Mr. Hanson correctly points out that the IAD is mistaken as it relates to his eligibility for halibut QS. In fact, Mr. Hanson received IFQ credit for halibut landings from the F/V RONDOUT in each year from 1986 through 1990.

⁶In his affidavit, Mr. Hanson states that he made sablefish landings in 1987, 1991, 1992, 1993, and 1994. He submitted copies of Alaska fish tickets in support of this claim. He does not claim, and there is no evidence in the record, that he made any sablefish landings in 1988, 1989, or 1990.

⁷Appeal No. 95-0023, September 3, 1998.

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

2. If Mr. Hanson is not a qualified person for sablefish QS, can he nonetheless receive an initial issuance of sablefish QS based on hardship or unavoidable circumstances?

As previously noted, Mr. Hanson has submitted evidence that he made sablefish landings in 1987, and in every year from 1991 through 1994. Mr. Hanson states that he made a "substantial investment" in sablefish gear in 1987, and planned to participate in the sablefish fishery in 1988, but due to delays for repairs needed on his vessel, the F/V RONDOUT, he was unable to fish sablefish in 1988. Mr. Hanson states that the expense of repairing the F/V RONDOUT kept him from being able to afford the extra expense of fishing for sablefish in 1989 and 1990, in addition to his halibut and salmon fishing in those years. He argues that his failure to fish sablefish during the QS qualifying years was due to unavoidable circumstances beyond his control, and that because he intended to fish during those years he is entitled to receive IFQ credit for an unspecified number of qualifying pounds of sablefish for the qualifying years, as well as for his documented 1987 sablefish landings.

I note that Mr. Hanson used the F/V RONDOUT to fish halibut in 1988, 1989, and 1990, but I make no findings regarding whether he was actually prevented from fishing sablefish during those years by "unavoidable circumstances beyond his control". Even if true, the existence of such circumstances would not entitle Mr. Hanson to receive sablefish QS. This Office has ruled in several cases that the IFQ regulations require the initial issuance of QS to be based on actual, not hypothetical landings.⁹ The North Pacific Fishery Management Council in 1994 rejected a proposal to create a "hardship" exception to this rule.¹⁰ In light of the regulations of the IFQ program, and the expressed intent of the Council, I must conclude that Mr. Hanson is not eligible for an initial issuance of sablefish QS, and that this Office has no authority to order the issuance of QS to compensate him for his unfortunate circumstances.

FINDING OF FACT

No legal landings of sablefish were made from any vessels owned or leased by Mr. Hanson during the QS qualifying years, 1988-1990.

CONCLUSIONS OF LAW

1. Applicants for QS must qualify separately for halibut QS and sablefish QS.
2. Mr. Hanson is not a qualified person for sablefish QS, despite the fact that he is a qualified person for halibut QS and has received an initial issuance of halibut QS.

⁹See, e.g., Kenneth M. Adams, Appeal No. 95-0004, March 22, 1995.

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

3. The initial issuance of QS must be based on actual, not hypothetical landings.
4. This Office has no authority to order the issuance of QS to compensate an applicant for the failure to fish a species during the QS qualifying period due to unavoidable circumstances beyond the applicant's control.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect July 6, 1999, 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 June 14, 1999, the tenth day after the date of this Decision. 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.

Edward H. Hein
Chief Appeals Officer