

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 95-0053
)
VAN M. SCHMITTOU,) DECISION
Appellant)
_____) October 26, 1998

STATEMENT OF THE CASE

Appellant Van M. Schmittou timely appealed an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program¹ [RAM] on March 20, 1995. The IAD denied Mr. Schmittou's application for Quota Share [QS] under the Individual Fishing Quota [IFQ] program because there was no evidence showing that Mr. Schmittou owned or leased a vessel from which legal landings of halibut or sablefish were made in a QS qualifying year (1988, 1989, or 1990).

On appeal, Mr. Schmittou claims that he made legal landings of sablefish that qualify him for QS and, alternatively, that NMFS should grant him QS under a hardship exception because the EXXON VALDEZ oil spill prevented him from fishing.

Mr. Schmittou has adequately shown that his interest is directly and adversely affected by the IAD. 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, no hearing was ordered. 50 C.F.R. § 679.43(g)(2)-(3).²

ISSUES

1. Did Mr. Schmittou own or lease a vessel that made legal landings of sablefish in a QS qualifying year?
2. Can Mr. Schmittou be granted QS under a hardship exemption because of the EXXON VALDEZ

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

²Formerly 50 C.F.R. § 676.25(g)(2)-(3). All IFQ regulations were renumbered, effective July 1, 1996. *See* 61 Fed. Reg. 31,270 (1996). The wording of the regulations at issue was unchanged by the renumbering.

oil spill?

BACKGROUND

On March 24, 1989, oil was spilled from the EXXON VALDEZ. An emergency order from the Alaska Department of Fish & Game closed all waters of the Prince William Sound Management Area to the taking of sablefish between March 28, 1989, and August 15, 1989.³

Mr. Schmittou submitted with his appeal an unsigned letter to NMFS, stating that "on or about April 7, 1989, he harvested black cod (sablefish) aboard his vessel, the F/V DOMINATOR, in the outer Prince William Sound area, known as the "North Gulf District." Mr. Schmittou stated that he was later told that all fishing was closed in that area, and that no processor should purchase sablefish caught in the area. He chose not to attempt to sell the fish in Kodiak. He attempted to sell the fish to a tender, the F/V VALENTINE, but the fish was refused due to the proximity to the oil spill. Mr. Schmittou stated in his letter that because the fish tender did not have any sablefish fish tickets, they filled out a ticket from an old book Mr. Schmittou happened to have with him. Mr. Schmittou stated in his letter that there were three and a half totes of fish weighing approximately 7,000 pounds that were pitched to the tender and subsequently discarded. He kept the pink copy of the fish ticket, and was assured the other part of the ticket would be turned in to the Alaska State Department of Fish and Game.

Mr. Schmittou stated in his letter that in September 1989 he filled out a claim for sablefish with Exxon Corporation, and that he gave his pink ticket to Exxon. Mr. Schmittou submitted with his appeal a photocopy of a fish ticket that he represents is the fish ticket for the April 1989 run, although the date is not legible. The fish ticket states as the area caught: "Outer PWS." The blanks for type of fish and pounds are not filled in. The fish ticket has written across the front in large block letters: "VOID CANNOT PURCHASE." Beneath those words the ticket states: "Approx. 3 totes 6500# 7000# Oil Contaminated."

RAM's records do not show that Mr. Schmittou owned or leased a vessel from which any legal halibut or sablefish landings were made during the qualifying years. Mr. Schmittou did not submit any additional evidence of legal landings.

DISCUSSION

1. Did Mr. Schmittou own or lease a vessel that made legal landings of sablefish in a QS qualifying year?

³A second emergency order, dated April 24, 1989, closed "the state waters of the Outer and Eastern Districts of the Cook Inlet Management Area."

To qualify for QS under the regulations of the IFQ program, as implemented by RAM, a person must have owned or leased a vessel that made at least one legal landing of halibut and sablefish during any of the QS qualifying years, 1988, 1989 or 1990.⁴ Sablefish harvested within Prince William Sound, or under a State of Alaska limited entry program, cannot be considered in determining whether a person is qualified for QS.⁵ A "legal landing of halibut or sablefish" means halibut or sablefish harvested with fixed gear and landed in compliance with state and Federal regulations in effect at the time of the landing.⁶ Evidence of a legal landing is limited to a state fish ticket [or federal catch report] that shows the amount of halibut or sablefish harvested, the IPHC regulatory area or groundfish reporting area in which it was caught, the vessel and gear type used to catch it, and the date of harvesting, landing, or reporting.

The evidence submitted by Mr. Schmittou is insufficient to qualify him for QS. The fish ticket is for sablefish harvested in "Outer PWS," which is specifically excluded from consideration for QS. The fish ticket is also illegibly dated and does not show whether the fish were legally landed because there is no date for the harvest or landing of the fish. The emergency order further shows that even if the fish had been harvested on the date as claimed ("on or about April 7, 1989"), the fish would not have been legally landed because the harvest would not have been made in compliance with the state regulations, which prohibited fishing in Prince William Sound during that time.

Therefore, I find that Mr. Schmittou did not own or lease a vessel that made legal landings of sablefish in a QS qualifying year.

2. Can Mr. Schmittou be granted QS under a hardship exemption because of the EXXON VALDEZ oil spill?

Mr. Schmittou argues as an alternative basis for relief that NMFS should grant him a hardship exemption due to the EXXON VALDEZ oil spill and the resulting closure of the longline sablefish fishery in which he was participating. This argument has been considered and rejected by this Office in several previous decisions.

In Kenneth M. Adams,⁷ the appellant requested a recalculation of his QS to include hypothetical landings for 1989, the year of the EXXON VALDEZ oil spill. This Office found that the North Pacific Fishery Management Council had considered the effects of the EXXON VALDEZ oil spill when the

⁴50 C.F.R. § 679.40(a)(2)-(3); formerly 50 C.F.R. § 676.20(a)(1).

⁵50 C.F.R. § 679.40(a)(2)(iv); formerly, 50 C.F.R. § 676.20(a)(1).

⁶50 C.F.R. § 679.40(a)(3)(v); formerly, 50 C.F.R. § 676.20(a)(1)(v).

⁷Appeal No. 95-0004, March 22, 1995.

IFQ program was under development. The Council provided for disruptions of the fishery caused by the oil spill in its calculation formula for initial allocation of QS. Similarly, in Michael C. Hatten,⁸ and Jimmy D. Hutchens,⁹ the appellants sought credit for landings they estimated they would have made in 1989, but for the EXXON VALDEZ oil spill. Again, this Office held that no credit can be given for landings not actually made, even if due to a hardship, such as the EXXON VALDEZ oil spill.

In the above cases the appellants were qualified persons, but were not granted additional pounds based on the hardship caused by the EXXON VALDEZ oil spill. This Office has also declined to recognize a hardship exception for those who claim they would be qualified persons but for the EXXON VALDEZ spill. In William E. Crump,¹⁰ an appellant who claimed he would have made legal landings but for the EXXON VALDEZ oil spill was found not to be a qualified person. Similarly, in Everett J. Lindholm,¹¹ this Office denied relief to an appellant who had not longlined during any QS qualifying years for various reasons, including the impact of the EXXON VALDEZ oil spill.

Mr. Schmittou's claim based on hardship is not a legal basis for QS. Therefore, he cannot be granted QS as a result of this hardship.

FINDINGS OF FACT

1. The fish ticket in support of Mr. Schmittou's claim of sablefish QS shows that the sablefish was harvested in the outer Prince William Sound.
2. The fish ticket in support of Mr. Schmittou's claim of sablefish QS does not have a legible date for the harvest or landing of the fish.
3. The State of Alaska's emergency order for the closure of the sablefish fishery in Prince William Sound was in effect at the time of the harvest of sablefish claimed by Mr. Schmittou.

CONCLUSIONS OF LAW

1. Mr. Schmittou does not have sufficient evidence showing that he made legal landings of sablefish

⁸Appeal No. 95-0136, January 30, 1996, *aff'd* January 31, 1996.

⁹Appeal No. 95-0094, June 28, 1995.

¹⁰Appeal No. 95-0024, June 27, 1995.

¹¹Appeal No. 95-0107, August 6, 1996. *See also*, Charles J. Petticrew, Appeal No. 95-0008, decided July 3, 1996.

that qualify him for QS.

2. No QS can be given for landings not actually made, even if due to a hardship, such as the EXXON VALDEZ oil spill.

DISPOSITION

The IAD, dated March 20, 1995, which denied Van M. Schmittou's application for QS, is hereby AFFIRMED. This decision takes effect on November 25, 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 November 5, 1998, the tenth day after the date of this Decision. 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.

Rebekah R. Ross
Appeals Officer

Randall J. Moen
Appeals Officer