NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0078
	)	
JAMES D. EASTERLING,	)	DECISION
Appellant	)	
_____	)	December 26, 1996

STATEMENT OF THE CASE

Appellant James D. Easterling filed an appeal of an Initial Administrative Determination [IAD] dated January 17, 1995, by the Restricted Access Management Division [Division] of the National Marine Fisheries Service. The IAD denied Mr. Easterling's application for quota share [QS] under the Individual Fishing Quota [IFQ] fishing program for Pacific halibut and sablefish because he did not adequately prove that he had owned or leased a vessel during a QS qualifying year, 1988, 1989, or 1990. A telephonic hearing was held May 21, 1996, before Appeals Officer Randall J. Moen. Mr. Easterling was the only witness. Another telephonic hearing was held on October 8, 1996. Mr. Easterling and Mr. Dennis McCusker testified at the hearing. Mr. Easterling's appeal was timely filed, and his interests are directly and adversely affected by the IAD.

ISSUE

Whether Appellant leased the F/V PLOVER during the May 1988 halibut opening.

BACKGROUND

Mr. Easterling filed his Application for QS, claiming that he leased the F/V PLOVER from Mr. Dennis McCusker during the period of May 5-27, 1988. Mr. Easterling's Application was denied by the Division for insufficient evidence. The QS that Mr. Easterling had applied for was issued to Mr. McCusker, as the registered owner of the F/V PLOVER. Mr. McCusker has since sold the QS,[1] and therefore is not a party to this appeal. Mr. McCusker never answered the question on his Request for Application [RFA] for QS as to whether he had ever leased the F/V PLOVER.[2]

On May 23, 1995, Mr. Easterling appealed the denial of his Application, claiming QS on the basis of

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[1]*See* the Division's records which show that Mr. McCusker sold all of the QS attributed to landings made from the F/V PLOVER.

[2]Mr. McCusker was asked on Form D of his RFA: "Was this vessel [the F/V PLOVER] LEASED TO YOU Yes( ) No ( ) or LEASED FROM YOU Yes ( ) No ( ) for purposes of fixed gear commercial fishing during 1984-1991?" [Emphasis not added].

an oral lease of the F/V PLOVER with Mr. McCusker for the May 1988 halibut opening.[3] Mr. Easterling claims that under the terms of the lease he was required to pay Mr. McCusker 35 percent of the gross value of any fish caught, and all costs associated with the fishing operation. Mr. Easterling has submitted the following relevant evidence for consideration on appeal:

- a handwritten and unsigned settlement sheet for the F/V PLOVER, dated June 10, 1988, which included the phrase: *lease 35% off top*, and with the heading: *Dennis McCusker*[,] *F/V PLOVER;*

- a State of Alaska fish ticket for 3,785 pounds of halibut landed on Mr. Easterling's permit from the F/V PLOVER on May 24, 1988;

- the 1988 federal income tax return (Schedule C, line 22) of Mr. Easterling, showing a deduction of $3,646 for "rent on business property;"

- a receipt for $60 paid by Mr. Easterling for a 1988 halibut fishing permit;

- a statement acknowledging a 1988 halibut draw for "Woody" (Mr. Easterling's crew member) in the amount of $835.20;

- a fuel receipt for $22.05 paid by Mr. Easterling to North Pacific Fuel, May 22, 1988;

- a receipt for $21.08 paid to Kodiak Marine Supply, Co., May 21, 1988, for knives;

- a $14.14 receipt for cash paid for groceries;

- a $4.82 receipt for cash paid for a water container;

- a $23.13 receipt, dated May 23, 1988, for cash paid to City of Kodiak for grid use;

- a boat settlement receipt from Western Alaska Fisheries, Inc., June 2, 1988, showing a payment of $4,334 to Mr. Easterling, as the skipper of the F/V PLOVER; and

- a $595 receipt from Western Alaska Fisheries, Inc., dated May 25, 1988, for the charge of octopus bait in the name of Mr. Easterling and the F/V PLOVER.

During the first hearing, Mr. Easterling testified that he and Mr. McCusker agreed to the lease of the

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[3]According to the International Pacific Halibut Commission, the May 1988 halibut opener was for one full 24 hr. day, May 23-24.

F/V PLOVER for the May 1988 halibut opener, and that the word *lease* was specifically used. Under the lease, Mr. McCusker would get 35 percent "off top" and Mr. Easterling would "cover everything else." It was a "handshake deal" in which Mr. Easterling would prepare the vessel, use it for the halibut opener, and clean and return it in reasonable shape. Mr. Easterling testified that Mr. McCusker told him that "it was on my shoulders, and that he wasn't going to spend any money on the boat." Mr. Easterling stated that he had sole control of the vessel and that he hired and paid the one crew member, "Woody," out of Mr. Easterling's earnings from the catch. Mr. Easterling and Mr. McCusker testified that no vessel insurance existed, liability or hull. Mr. Easterling paid for the halibut fishing permit, and nothing was specified regarding the use of fishing gear. Mr. Easterling testified that while he provided 1,000 fish hooks, 99 percent of the fishing gear was provided by Mr. McCusker.

Mr. Easterling stated that he captained the vessel, and directed the vessel's fishing operations; and that he decided where to fish, how to fish, when to fish, whom to hire, and where to land and market the fish. He further stated that Mr. McCusker placed no restrictions on his activities. Mr. Easterling testified that he set up his own account for fuel and bait with Western Alaska Fisheries; and that he had claimed the fee that he paid Mr. McCusker for use of the vessel, as a lease deduction on his 1988 federal income tax return. He also stated that he wrote the settlement sheet of June 10, 1988, and when he gave Mr. McCusker a copy of it, Mr. McCusker did not object to the word *lease* used in the document.

Mr. Easterling testified that when he phoned Mr. McCusker in the fall of 1994, Mr. McCusker said he would sign the lease affidavit form that Mr. Easterling had sent him because he had indeed leased the F/V PLOVER to him. Mr. McCusker never signed the form. Mr. Easterling sent Mr. McCusker another lease affidavit, and phoned Mr. McCusker again (approximately on December 17, 1994), and was told by Mr. McCusker that he had changed his mind after talking to an IFQ broker.[4] Mr. Easterling testified that he caught the fish, and landed the catch in his name, and that Mr. McCusker was never aboard the vessel and had nothing to do with the harvesting, landing, or marketing of the fish.

Mr. Easterling testified that he paid the expenses of the venture. He acknowledged, however, that Mr.

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[4]*See* Mr. Easterling's May 21, 1996, affidavit, which was submitted to this office after the hearing; the unsigned and undated handwritten notes from Appellant's file, which were written apparently by Mr. Easterling's wife, reflecting a record of telephone conversations between Mr. Easterling and Mr. McCusker, and a copy of the lease affidavit that was sent by Mr. Easterling to Mr. McCusker on two separate occasions. The handwritten notes read [verbatim]: "Shortly after return Jim contacted Mr. McCusker - said he was having marital problems? couldn't find the form I had sent. Immediately sent him another waited aprox. 10 days to 2 weeks. No response. - Jim again called McCusker (aprox. 12/17/94). McCusker said he had contacted a broker who told him he should not sign the form. At this time, Jim wrote the letter dated 12/20/94; we proceeded the best we could."

McCusker may have paid for the hydraulic fluid, grid use, and engine oil, and that he did not pay to repair the vessel's mast, which had been broken during the venture. Mr. Easterling testified that he never acted on behalf of Mr. McCusker, or served as his skipper during the May 1988 halibut opener.

At the second hearing, Mr. McCusker testified that he had fished every halibut opener during the past 10 years, but decided not to do the May 1988 opener with the F/V PLOVER because he had a better opportunity aboard another vessel. Five or six days before the opener, Mr. McCusker told Mr. Easterling that he could take the vessel, and that all he had to do was to "put the gear on and go."

Mr. McCusker denied that the word "lease" was used in his arrangement with Mr. Easterling. He stated that back in the 1980's, the word "run" was used, and that now with IFQ, "leased" is used. He characterized his relationship with Mr. Easterling as a "neighbor" or "friend" who "ran" his boat. He testified that he never advertised the "lease" of his vessel; it just happened that his neighbor needed it. He stated that he never hired Mr. Easterling as an employee. He acknowledged Mr. Easterling as independent -- his own person. It was understood that the vessel was to be used only for the May 1988 opener, and that a price would be paid for the use of the vessel. Mr. McCusker thought the price was set at "50-50," but did not deny that it may have been at 35 percent of the vessel's gross (as noted in the June 10, 1988, settlement sheet). Mr. McCusker believed he could reclaim the vessel at any time during the opener, but wouldn't have, unless for "something radical, like drinking or bad weather."

Mr. McCusker put restrictions on Mr. Easterling's use of the vessel. The vessel was small [28 ft.], "old" and "funky, but functional," and was Mr. McCusker's "baby." He told Mr. Easterling that he had to stay in the Chiniak Bay area and to not go to Marmot Bay under any circumstances, and that if he didn't like it, he would have to find another vessel. Mr. McCusker knew that if the vessel stayed in Chiniak he would be within distance to fix it, and he didn't want to get stuck with towing costs. He wanted Mr. Easterling to be "safe," and he didn't want to "worry" about his boat. Mr. McCusker testified that during the opening he showed Mr. Easterling where to fish and advised him what to do after he had caught approximately 200 pounds of fish. Mr. McCusker stated that Mr. Easterling was free to market the fish at any cannery, other than the one owned by the "Moonies."

Mr. McCusker testified that he never agreed to sign the lease affidavit and that he would not sign it to this day. He said he refused to sign it not only because it was not in his best interests to do so, but also because it was not a "fair representation" of what his arrangement was with Mr. Easterling. He does not know why he did not state on his RFA that he did not lease the vessel, and could not recall the June 10, 1988, halibut settlement sheet or having seen the word "lease" on it. He recalls being paid for the use of the vessel.

Mr. McCusker stated that it was Mr. Easterling's responsibility to bring the vessel back in good condition, absent normal use. He was extremely upset when the vessel was returned with a broken mast, and hurt because he believed that Mr. Easterling had lied about what had happened to the mast

and had never offered to pay for its repair or to help him fix it. Mr. McCusker estimated the mast's cost of repair at less than $500. Mr. McCusker testified that the vessel's credit was used for the venture, and subject to maritime liens in the event of unpaid debts.

Mr. McCusker testified that Mr. Easterling was responsible for fishing expenses; and that he (Mr. McCusker) was responsible for the vessel's repairs (alternator, fuel pump, battery, starter, etc.). He believed Mr. Easterling was obligated (at least as a friend or neighbor) to pay for or fix the mast because he had grossly misused it. Mr. McCusker testified that he doesn't believe that a "lease" existed, primarily because he would not have let his boat to be used as a business, and Mr. Easterling was not permitted to do with it as he pleased.

On rebuttal [redirect], Mr. Easterling testified that he understood that the vessel's age and size restricted its use, and that the vessel was "well-used", and "not something you took 20 miles offshore." He did not recall being told not to go to Marmot Bay, or if he even wanted to go there at all. He said that they discussed "good possible spots" for fishing, but that no restrictions were placed on "where I was told to fish." In reply to Mr. McCusker, Mr. Easterling stated: "I used your boat, and you got paid for it." He claims that he offered to fix the mast, but did not feel responsible for it because he did not do anything "out of the ordinary" to cause the mast to break.

DISCUSSION

Under 50 C.F.R. § 679.40(a)(2),[5] a person who 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 (1988, 1989, or 1990) is a "qualified person."

The regulations 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. 50 C.F.R. § 679.40(a)(3)(iii).[6]

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[5]Formerly 50 C.F.R. § 676.20(a)(1). Effective July 1, 1996, 50 C.F.R. Part 676 was removed and the regulations thereunder were renumbered. However, there have not been any changes material to the issues in this appeal.

[6]Formerly 50 C.F.R. § 676.20(a)(1)(iii).

Here, there is no conclusive evidence of a lease, either in the form of a written lease agreement or a notarized statement. The question, therefore, is whether Mr. Easterling has presented sufficient *other evidence* of an oral lease of the F/V PLOVER.

The regulations do not define what constitutes a lease. This office has identified seven factors[7] that an appeals officer should consider in making a case-by-case determination of whether a business relationship will be recognized as a lease when there is no written agreement. The factors include, but are not limited to:

> (1) how the parties characterized their business arrangement at the relevant times;
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> (2) whether and to what extent the claimed lessee had possession and command of the vessel and control of the navigation of the vessel;
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> (3) whether the claimed lessee directed the fishing operations of the vessel;
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> (4) whether the claimed lessee had the right to hire, fire, and pay the crew;
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> (5) whether the claimed lessee was responsible for the operating expenses of the vessel;
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> (6) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her business for federal income tax and other purposes; and
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> (7) whether the claimed lease had a set or guaranteed term.

As a guideline in weighing the factors we stated in O'Rourke v. Riddle[8] that the North Pacific Fishery Management Council [Council] intended to award QS to those persons who could prove an oral lease, and who had supplied the means to harvest the fish, suffered the financial and liability risks to do so, and directed the fishing operations. In short, the Council intended QS for persons who, as lessees, had acted liked entrepreneurs.[9]

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[7] *See, e.g.*, F/V Determined Partnership v. Big Blue, Inc., Appeal No. 95-0049, October 22, 1996, *aff'd*, November 5, 1996; Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996, *aff'd*, August 20, 1996; Kristovich v. Dell, Appeal No. 95-0010, March 20, 1996, *aff'd*, March 27, 1996.

[8] *See* O'Rourke v. Riddle, Appeal No. 95-0018, decided May 18, 1995, *aff'd*, May 23, 1995.

[9] According to WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 436 (1988), an "entrepreneur" is one who organizes, manages, and assumes the risks of a business venture in the expectation of gaining the profit.

I shall now consider the factors to determine whether the unwritten arrangement between Mr. Easterling and Mr. McCusker was a lease.

1. Mr. Easterling's and Mr. McCusker's characterization of their arrangement.

Mr. Easterling and Mr. McCusker disagree as to whether they characterized their arrangement as a lease. Mr. Easterling testified that the word "lease" was used in their oral agreement. He claimed he leased the vessel as a business rental on his 1988 federal tax return, and that he wrote the word "lease" in the June 10, 1988, settlement statement to describe his payment to Mr. Easterling for the use of the vessel. Mr. Easterling stated that he also twice attempted to get Mr. McCusker to sign a lease affidavit for the vessel. (This was not disputed by Mr. McCusker).

Mr. McCusker, on the other hand, testified that the word "lease" was not used when he agreed to let Mr. Easterling use his vessel, and that he refused Mr. Easterling's request to sign an affidavit acknowledging the existence of a lease. Mr. McCusker characterized Mr. Easterling as a neighbor or friend who ran his vessel. He stated that Mr. Easterling was his own person, not an employee, with respect to the vessel, and acknowledged that Mr. Easterling had paid him for the use of the vessel. McCusker admitted that he did not object to the word "lease" when shown the June 10, 1988, settlement sheet; that he did not tell Mr. Easterling that he would not sign the lease affidavit, when first asked by Mr. Easterling; and that he did not refuse to sign the lease affidavit until after talking to his IFQ broker (the name of which he refused to reveal during the hearing).

The weight of the evidence shows that the parties, at relevant times prior to the IFQ program, and contemporaneous to the time of their agreement, characterized their arrangement for the use of the vessel as a lease. Mr. McCusker admits that Mr. Easterling was not a hired skipper or employee. The June 10, 1988, halibut settlement sheet, which was shown to Mr. McCusker at time of payment, provides that Mr. McCusker was paid for the "lease" of the vessel. On several noteworthy occasions prior to his appeal, Mr. McCusker failed to deny that a lease existed: when he applied for QS on his RFA; when he was paid and shown the halibut settlement sheet; and when Mr. Easterling first asked him to sign an affidavit acknowledging the existence of a lease. On this latter occasion, he told Mr. Easterling that he had misplaced or lost the affidavit and asked him to send another. Mr. McCusker now claims that a lease never existed. I find that his previous conduct was inconsistent with this characterization of his arrangement with Mr. Easterling. On balance, therefore, I find by a preponderance that the parties characterized their relationship as a lease.

2. Possession and command of the vessel, and control of the vessel's navigation.

Mr. Easterling caught, and landed the halibut on his gear card, and claims that he had sole authority to captain, possess, and navigate the vessel. Mr. McCusker was not on board the vessel, and did not command or control its navigation via radio or other means during the opener. Mr. McCusker

contends that he told Mr. Easterling that he could not take the vessel to Marmot Bay. Mr. Easterling does not recall any such restriction. Given the size and age of the vessel, the nature of the area, Mr. McCusker's concern about his vessel (his "baby"), and his concern about Mr. Easterling's experience, I find that the restriction most likely existed. I further find that the restriction should not be construed against Mr. Easterling because it required of him no more than what would have been reasonably required of anyone else: to use the vessel safely. Even with the restriction, it was still Mr. Easterling's operation. He was free to pursue whatever profit he could without compromising crew or vessel safety. Consequently, I find the evidence shows that Mr. Easterling was the one in sole control of the vessel -- possessing, commanding, and controlling the vessel's navigation -- during the tenure of the alleged lease.

3. Direction of the fishing operations of the vessel.

Both Mr. Easterling and Mr. McCusker agree that they discussed the best possible places to fish, and that during the venture Mr. Easterling sought Mr. McCusker's advice, but that at all times Mr. Easterling was free to choose where to fish in the Chiniak area. Mr. McCusker told Mr. Easterling that he was free to market the fish, with the exception of one particular cannery. There is no evidence to suggest that the particular cannery would have been used by Mr. Easterling, even without the restriction. Consequently, I find that the weight of the evidence shows that Mr. Easterling decided where to fish and to market the fish during the tenure of the alleged lease.

4. The right to hire, fire, and pay the crew.

It is not disputed that Mr. Easterling had the right to hire, fire, and pay the crew, nor is evidence in the record to suggest otherwise. The one crew member was hired and paid by Mr. Easterling.

5. Responsibility for the operating expenses of the vessel.

In Smee,[10] we stated that operating expenses of the vessel are those operating expenses that are attributable to the fishing operations in question. These would include trip expenses, as well as other expenses necessitated by the fishing operations. While a party's investment in the fishing enterprise is certainly a significant factor, the North Pacific Fishery Management Council did not require that a person must have made a certain level of investment to be considered a lessee under the IFQ program. For example, when there is a written lease, a lessee need not make any capital investment.[11]

As with other factors, a flexible approach is needed when considering responsibility for operating

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[10]Appeal No. 95-0076, August 1, 1996, *aff'd*, September 3, 1996, at 12.

[11]*Id.*, at 13.

expenses. Because of the great variety in commercial fishing business arrangements, and in the way expenses and risks of fishing operations are allocated between the parties, no single expense or category of expenses is likely to determine whether the parties had a lease agreement or not. Operating expenses should be considered only to the extent that they shed light on the question of whether a vessel lease existed. The question is not which party invested more money in the fishing operations; rather, it is whether the payments, responsibilities, risks, and method of operation -- as evidenced by the handling of expenses -- tend to show that there was a lease.

The parties do not dispute the context and basics of their financial arrangement. The vessel was for a one-day opener, and geared up and ready to go for a small operation; and costs were anticipated as minimal. The vessel was small and "funky", old and uninsured, and Mr. Easterling was not expected to pay for or provide insurance, just pay for crew share, bait, groceries, fuel, supplies, and any additional gear he felt necessary. The vessel was required to stay close to shore and near town, so that Mr. McCusker could perform repairs, if necessary. Mr. Easterling arranged for credit for the venture with the cannery, Western Alaska Fisheries, Inc.; paid for his halibut fishing permit ($60); provided 1,000 of his own halibut fishing hooks; and shared bait expenses ($595) with his crew member. He also paid out-of-pocket for groceries ($14.14), a water container ($4.82), and knives ($21.08). Mr. Easterling did not pay for any insurance or to repair the mast, which was broken during the trip, and provided only a minimal amount of the fishing gear. He was reimbursed for the expenses he believed were needed to prepare the vessel for the opener ($64.68), which included fuel, oil, and grid use. Mr. McCusker did not pay for any vessel insurance, was at risk for repairs and the bait, since the bait was charged to Mr. Easterling and the vessel, and paid to prepare the vessel for the opener. The only real disagreement between the parties was whether Mr. Easterling should have repaired the mast.

In the context of this case, the way the responsibility for the expenses was allocated does not shed much light on whether there was a lease arrangement. While Mr. Easterling did pay trip expenses, such could have also been expected of a hired skipper, and while Mr. McCusker paid for the vessel's preparation and repairs, such also could have been required of a lessee. Neither party made a substantial investment in this particular fishing operation. I note that Mr. McCusker did end up paying the fuel for the venture, which would be indicative of a non-lease arrangement. At the same time, however, Mr. McCusker testified that Mr. Easterling should have assumed responsibility for the repair of the mast, which would be consistent of a vessel lease arrangement. The evidence in this case of who assumed the vessel's operating expenses is simply not helpful in determining whether a lease existed between the parties. Therefore, I give little weight to this factor.

6. Treatment of the operation as a business for tax purposes.

Here, we examine tax returns to determine the extent that Mr. Easterling treated the vessel's operations as his business. Mr. Easterling testified that he claimed the $1,516 fee [35 percent of gross] that he paid Mr. McCusker for the use of the F/V PLOVER as a business lease deduction on his federal tax

return. Mr. Easterling's tax return shows that he claimed a deduction of $3,646 in 1988 for the rental of property for commercial fishing in 1988. Given that the fee paid for the F/V PLOVER is well within the deduction claimed on his tax return for property leased in 1988, and that Mr. Easterling also leased the F/V CAPITAN in 1988, I find it highly probable that Mr. Easterling treated the F/V PLOVER's operations as his business for tax purposes in 1988.

7. Whether the claimed lease had a set or guaranteed term.

Mr. Easterling testified that his agreement with Mr. McCusker was for the one-day May 1988 halibut opener, which included the time period to prepare the vessel and to clean it upon its return. Mr. McCusker agrees that it was understood that the vessel would be used for the opener, but asserts that he could have reclaimed the vessel at any time, had he seen fit. Given that both Mr. Easterling and Mr. McCusker clearly understood that the vessel was for the May halibut opener, and that a price had been set for the vessel's use, I find that the agreement was for a set or definite term.

Summary of the evidence.

The essential features of the arrangement between Mr. Easterling and Mr. McCusker are consistent with a lease. For a stipulated price [35 percent of gross], Mr. Easterling was permitted by the owner [Mr. McCusker] to exclusively possess, use, and enjoy property [the F/V PLOVER] for a defined period of time [the May 1988 halibut opener]. The arrangement satisfies six of the seven factors used by this office to ascertain the existence of a vessel lease under the IFQ program. The remaining factor, responsibility for operating expenses, is not helpful *in this instance* in determining whether or not a lease existed. I find it significant that Mr. McCusker admits that he did not hire or employ Mr. Easterling.

On balance, I am persuaded by a preponderance of the evidence that the arrangement between Mr. Easterling and Mr. McCusker was a lease for purposes of the IFQ program.

FINDINGS OF FACT

1. Mr. Easterling had possession and command, and control of the navigation of the F/V PLOVER; directed the vessel's fishing operations, and hired and paid the crew;

2. Mr. Easterling treated the operation of the F/V PLOVER as his business, paying rent for the use of the vessel, arranging for the marketing of the fish, paying for the halibut permit, readying the vessel for the opener, and supplying fishing hooks;

3. Mr. Easterling's use of the vessel was for a definite term, including the period a few days prior to the May 1988 halibut opener to prepare the vessel, the opener itself, and a few days after the opener to clean the vessel;

4. Mr. Easterling used the word "lease" in a settlement document that he gave to Mr. McCusker to describe the payment he made to Mr. McCusker for the use of the F/V PLOVER for the May 1988 halibut opener;

5. Mr. McCusker did not hire Mr. Easterling to skipper or crew the F/V PLOVER for the halibut opener; and

6. Mr. McCusker did not affirmatively deny that he had leased the F/V PLOVER on his RFA, when presented the June 10, 1988, halibut settlement sheet, and when first asked by Mr. Easterling to sign a vessel lease affidavit.

CONCLUSIONS OF LAW

1. Mr. Easterling leased the F/V PLOVER from the vessel's owner, Mr. Dennis McCusker, for the May 1988 halibut opener.

2. The qualifying pounds resulting from landings of halibut made from the F/V PLOVER during the May 1988 halibut opening, should be allocated to Appellant.

DISPOSITION AND ORDER

The Division's IAD, dated January 17, 1995, which denied Mr. Easterling's Application for QS on the basis of lack of proof of a lease of the F/V PLOVER is VACATED. The Division is directed to amend the NMFS official record to reflect that Mr. Easterling held a lease of the F/V PLOVER immediately before and after the May 1988 halibut opener; to allocate to him the qualifying pounds resulting from the May 24, 1988, halibut landing made from the vessel; and to issue to him any resultant QS and IFQ to which he may thereby be entitled. This decision takes effect on January 27, 1996, unless by that date the Regional Administrator orders review of the decision.

Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 4:30 p.m. Alaska Standard Time, on the tenth day after the date of this Decision, January 6, 1997. 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. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

Because Mr. Easterling still has an opportunity to receive QS and the corresponding IFQ for the 1997 fishing season, I recommend that the Regional Administrator 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