NOTE: ORIGINAL DECISION APPEARS IMMEDIATELY FOLLOWING DECISION ON RECONSIDERATION.

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0084
	)	
PROWLER PARTNERSHIP,	)	
Appellant	)	DECISION ON
	)	RECONSIDERATION
and	)	(PART I)
	)	
GAINHART SAMUELSON,	)	
Respondent	)	March 12, 1996
_____	)	

A decision was issued in this appeal on November 8, 1995. The decision concluded, among other things, that one-third of the qualifying pounds resulting from certain sablefish landings made from the F/V PROWLER during the period April 5, 1985, through June 9, 1989, were properly allocated by the Restricted Access Management Division [Division] to Gainhart Samuelson and denied to the Prowler Partnership. The decision also concluded that qualifying pounds for certain sablefish landings from the F/V PROWLER in 1987 and 1988, involving fish caught during research conducted under NMFS contracts, were properly denied to both parties.

After the decision was issued, but before it took effect, the Appellant filed a motion to reconsider the decision. That motion was granted by this office in an order dated March 5, 1996. As stated in the order, the Appellant's Points and Authorities in support of its motion was divided into two parts, which correspond to the two issues decided in the appeals decision. These two issues are distinct and severable. Therefore, in the interest of expediting a decision on reconsideration, I am severing the two issues. The first issue, involving the propriety of the allocation made to the Respondent, is addressed in Part I of this decision on reconsideration. The second issue will be addressed in Part II of the decision, which will be issued separately.

ISSUE

Whether one-third of the qualifying pounds resulting from certain sablefish landings made from the F/V PROWLER during the period April 5, 1985, through June 9, 1989, were properly allocated by the Division to Gainhart Samuelson and denied to the Prowler Partnership.

DISCUSSION

In Part I of its Points and Authorities [P&A] in Support of the Motion to Reconsider, the Appellant makes several arguments, all of which relate to the above-stated issue. Each of these arguments will be addressed in turn.

1. "The Prowler Partnership is the 'qualified person' pursuant to the IFQ regulations and the facts of this case."

In this argument, the Appellant reasserts that it owned the F/V PROWLER during the time in question, and that the Appeals Officer erred by not considering factors outside of the abstract of title to determine vessel ownership. Appellant argues that "all the indicia of ownership except the Abstract of Title point to the Partnership as owning the vessel." Appellant further states that the parties thought that the partnership owned the vessel. [P&A at 2]

As stated in the appeals decision, a United States Coast Guard abstract of title is the best evidence of vessel ownership under the IFQ program. Federal regulation 50 C.F.R. § 676.20(a)(1)(ii) specifically gives Coast Guard abstracts of title first priority among the limited list of documents that may be considered by the Division as evidence of vessel ownership. Absent any evidence that an abstract of title is erroneous or fraudulent, the Division is required to accept that document as proof of ownership. During the appeal, the Appellant did not challenge the validity or accuracy of the abstract of title, which showed that three individuals, including the Respondent, had held an undivided one-third ownership interest in the vessel during the period in question.

Contrary to the Appellant's assertion that the Appeals Officer did not consider other factors, the appeals decision makes clear that other proffered evidence of ownership besides the abstract of title was considered. Specifically, the decision mentions that the Co-Ownership Agreement, signed by all the owners, clearly states that they owned the vessel as tenants in common. The decision also notes that no documents were presented that established the partnership as owner of the vessel. On reconsideration, I note that two other documents relied on by the Appellant support the finding that the Respondent and the other owners held their interests as tenants in common. One document is the sales agreement, dated June 9, 1989, in which the Respondent transferred his one-third interest in the vessel to the other two owners. The agreement lists the buyers as John Winther and Douglas Bart Eaton, not the Prowler Partnership. Throughout the agreement, Winther and Eaton are referred to as "Buyers" not "Buyer." The other document is the release, dated February 10, 1990, in which John Winther and Omega-3, Inc., (not the Prowler Partnership) are stated as the owners of the F/V PROWLER. [Release at ¶ 1] These documents support the view that Messrs. Winther and Eaton purchased the Respondent's interest in the vessel as two individuals, not as a partnership.

On reconsideration, the Appellant argues [P&A at 4] that the manner in which the vessel was *operated* shows that the parties did not recognize the effectiveness of the provisions of the Co-Ownership

Agreement in which they stated that

> In no event shall the Vessel be considered to be owned or operated by a partnership composed of the parties and each party acknowledges that he is an independent contractor and not a partner or joint venturer with respect to the vessel or to the management or operation thereof. [Sales Agreement, ¶ 3]

This argument is simply an admission that, after representing to NMFS that they owned the vessel as tenants in common (and would not own or operate it as a partnership) in order to receive Capital Construction Funds, the parties did not abide by their word. Nonetheless, the Appellant has provided no evidence that ownership was ever transferred from the individual owners to the partnership. And regardless of how the vessel may have been *operated*, it is *ownership* that controls who receives credit for landings made from the vessel.

On reconsideration, the Appellant for the first time asserts that the partnership leased the vessel from the owners. This assertion is based on the argument that a lease existed because the "partnership exercised a level of control and responsibility for the operation of the Vessel that is the equivalent to a bare-boat charterer or lessee." [P&A at 3] Further, the Appellant argues that the Co-Ownership Agreement contains all provisions consistent with a vessel lease and, therefore, constitutes conclusive evidence of a lease under 50 C.F.R. § 676.20(a)(1)(iii). Finally, the Appellant argues that other evidence in the record concerning the partnership's operation of the vessel demonstrates that the partnership "shouldered the financial risks and burdens of the fishing operation" and, therefore, the partnership is the qualified person who should receive credit for the landings in question.

My response to the Appellant's claim that it held a vessel lease is that it is too late to make this assertion now, on reconsideration. No such claim has ever been made either during the appeal or during the application process. The purpose of reconsideration is to review possible errors or oversights by the Appeals Officer. Reconsideration is not intended, and cannot be used, as an opportunity to present entirely new claims. Thus, I reject as untimely the Appellant's assertion of a vessel lease.

2. "Samuelson sold his interest in Prowler Partnership quota shares when he sold his interest in the vessel and the partnership."

3. "Release confirms Samuelson's sale of partnership interest in IFQs."

4. "Either the partnership is a successor in interest or the successor in interest issue is moot because Samuelson transferred his interest pursuant to the sale agreement and release."

All three of these arguments (#2, 3, & 4) are based on Appellant's alleged purchase of the Respondent's interests in the vessel and the partnership/co-venture. Argument #2 is that by selling

these interests, the Respondent sold his interest in any Quota Shares that he would otherwise derive from those interests. This argument must fail. In Cadden v. Levenhagen and Pugh,[1] this office recognized that the IFQ regulations do not provide for assignments of initial QS eligibility.[2] And in the appeal decision in this case, I noted with approval that the "Division has consistently refused to recognize and enforce private agreements that purport to assign eligibility for the initial issuance of Quota Shares." [Appeal Decision at 7] Regardless of whether the Respondent intended to transfer any eligibility for QS along with the sale of his interests in the vessel and the partnership/co-venture, the Division is not bound by the terms of any such agreement between the parties. The issuance of QS is governed by the IFQ regulations, not by the terms of a private agreement. The Appellant must look to another forum to enforce any contractual rights it may have as a result of the sale agreement.

Aside from what the sale agreement may or may not have transferred to the buyers (Winther and Eaton), the Prowler Partnership itself never owned the F/V PROWLER. It is, therefore, irrelevant that the Respondent may have sold his interest in the partnership to his former partners. The Respondent's eligibility for the initial issuance of quota share was not based on his interest in the partnership. Rather, it was based on his historical interest in the vessel as an individual.

Appellant's argument #3 is that when the Respondent sold his interest in the vessel, he failed to reserve any interest in fishing rights that went with the vessel. This argument is not persuasive. As discussed in Cadden,[3] the IFQ program is not a vessel-based program. Quota Shares are issued to the qualified person who owned the vessel at the time the landings were made, not necessarily to the person who owns the vessel at the time of application for QS. As with argument #2, the transfer of the vessel, with or without a reservation of fishing rights, does not transfer eligibility for the initial issuance of QS.

Argument #4 is that the Appellant is the successor in interest to the Respondent because Messrs. Winther and Eaton continued to operate the F/V PROWLER after Mr. Samuelson sold his interests in the vessel and partnership to them. In the Appellant's view, the partnership/co-venture was never dissolved. In the appeals decision, I did not decide whether the partnership/co-venture that consisted of Messrs. Samuelson, Winther, and Eaton dissolved when Mr. Samuelson sold his interests, nor do I decide that question now. The continuation or discontinuance of the partnership/co-venture is irrelevant to the issue of who should receive credit for the landings in question in this portion of the appeal. The Appellant never owned the F/V PROWLER and is not, therefore, the qualified person with respect to

---

[1]Cadden v. Levenhagen and Pugh, Appeal No. 95-0013, January 17, 1996, *aff'd*, January 18, 1996.

[2]Cadden, at 7

[3]*Id.* at 3, n. 7.

this vessel.[4]

The Appellant further argues that even if Mr. Samuelson was the qualified person individually, the partnership is his successor in interest because it purchased his interests in the vessel and the partnership. The problem with this argument is that, first of all, it is not clear that the Appellant, as opposed to Messrs. Winther and Eaton as individuals, purchased Mr. Samuelson's interests. But even assuming that the Appellant was the buyer, the Appellant still cannot be the Respondent's successor in interest. That is because, in order to be considered a successor in interest under the IFQ program, one must succeed to the entire interest of the entitity that owned (or leased) the vessel.[5] That entity, with respect to the landings and qualifying pounds in question here, is Mr. Samuelson as an individual. He has no successor in interest because he is still alive.[6]

Additional evidence

Along with its Points and Authorities, the Appellant submitted several documents intended to challenge the Respondent's credibility. I have given this evidence no weight because the Respondent's credibility is not in issue. Although in the appeals decision I commented on the parties' competing assertions and affidavits regarding their intent and understandings surrounding the sale of the Respondent's interests and the release document, I did not rely on any evidence based on the Respondent's credibility in reaching a decision in the appeal. Therefore, credibility evidence is not relevant to the issue being decided on reconsideration.

The Appellant also submitted an affidavit of Sammy Parker, the office manager of the Prowler Partnership, who states that he maintained the partnership's books from 1985 until January 1991.. The affidavit discusses the collection and disbursement of proceeds from fishing activities involving the F/V PROWLER. Mr. Parker states that the proceeds went through the partnership's accounts and that the partnership paid for the operating and other expenses of the vessel. He also states that "it was my impression that all of the partners believed that the vessel itself was owned by the Partnership." [Parker

---

[4]This is so, notwithstanding the fact that the Division issued to the Appellant the QS that resulted from the other two-thirds ownership interests held by Mr. Winther and Omega-3, Inc. As in the appeals decision in this case, I do not decide whether that issuance was proper because that is not in dispute in this appeal.

[5]Cadden, at 7.

[6]As noted in the appeals decision at page 8, note 3, an individual qualified person who is still alive can have a successor in interest, but it can only be an entity under which the individual has continued to do business and which was in existence at the time of application for QS. Even then, however, the Division issues Quota Shares in the individual's name, unless the individual requests that they be issued to the successor in interest.

Affidavit, at 3] The affidavit was accompanied by four exhibits, which showed various figures relating to loans, accounts, and calculations. In addition, another affidavit of John Winther, dated December 19, 1995, was submitted. This affidavit reasserted that after purchasing the Respondent's entire interest in the vessel and partnership, the partnership continued to operate the vessel in the same manner as before the purchase. I gave this evidence little weight because eligibility for QS is based on actual vessel ownership, not the method of vessel operation or the parties' professed beliefs about ownership.

FINDINGS OF FACT

1. The Prowler Partnership itself never owned the F/V PROWLER.

2. The Respondent's eligibility for the initial issuance of quota share was not based on his interest in the partnership. Rather, it was based on his historical interest in the vessel as an individual.

CONCLUSIONS OF LAW

1. The purpose of reconsideration is to review possible errors or oversights by the Appeals Officer. Reconsideration is not intended, and cannot be used, as an opportunity to present entirely new claims.

2. The IFQ regulations do not provide for assignments of initial QS eligibility.

3. The transfer of a vessel, with or without a reservation of fishing rights, does not transfer eligibility for the initial issuance of QS.

4. The issuance of QS is governed by the IFQ regulations, not by the terms of a private agreement.

5. To be considered a qualified person's successor in interest under the IFQ program, one must succeed to the entire interest of the entitity that owned (or leased) the vessel.

6. The Appellant is not a qualified person with respect to the F/V PROWLER.

DISPOSITION

That portion of the decision in this appeal, dated November 8, 1995, relating to issue #1 (the issue in this decision on reconsideration, part I) is AFFIRMED. That decision, including the findings of fact, conclusions of law #1, 2, and 3, and the disposition and order to the extent that they pertain to issue #1, are incorporated by reference and made a part of this decision on reconsideration, part I. This decision on reconsideration, part I, takes effect April 11, 1996, unless by that date the Regional Director orders review of it.

In order to ensure that QS and Individual Fishing Quota [IFQ] are issued to the Respondent in time for the start of the 1996 season, I recommend that the Regional Director 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.

Edward H. Hein
Chief Appeals Officer

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0084
	)	
PROWLER PARTNERSHIP,	)	
Appellant	)	DECISION
	)	
and	)	
	)	
GAINHART SAMUELSON,	)	November 8, 1995
Respondent	)	
_____	)	

STATEMENT OF THE CASE

On June 6, 1995, the Prowler Partnership[1] filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on April 5, 1995. The IAD allocated to Gainhart Samuelson one-third of the qualifying pounds resulting from certain sablefish landings made from the F/V PROWLER during the period April 5, 1985, through June 9, 1989. The IAD found that Mr. Samuelson, as an individual, had owned a one-third interest in the vessel during that period and made the allocation on that basis. These same qualifying pounds were denied to the Prowler Partnership on the grounds that the partnership itself never owned the vessel.

The IAD also denied the Prowler Partnership's claim to qualifying pounds for certain sablefish landings from the F/V PROWLER in 1987 and 1988. Those fish had been caught during longline surveys conducted by the National Marine Fisheries Service [NMFS], which had chartered the vessel for that purpose. Under the terms of the charter contract, the owners of the F/V PROWLER were permitted to process and sell the fish that were caught. In the IAD, the chief of the Division considered whether the contract with NMFS constituted a vessel lease for purposes of the IFQ program, thereby precluding the allocation of qualifying pounds to the Appellant. Copies of the contracts were not presented to the Division, and the IAD did not resolve this issue, though it found a "clear inference" from the record that the F/V PROWLER had been leased to NMFS during the time the surveys were conducted. The stated basis for denying the allocation to the Appellant was that the landings were not conducted in compliance with IFQ regulations. For the same reasons, the IAD also denied Mr. Samuelson's claim to one-third of these pounds.

---

[1]The name used by the Appellant in its Request for Application and its Application for Quota Share was Prowler Partnership. That is also the name that appears on the Initial Administrative Determination and the name under which records relating to it are filed with the Restricted Access Management Division. In its appeal, the Appellant began referring to itself as the Prowler Co-venture.

After extensive briefing and replying by both parties, the record in this appeal was closed and the Appellant's requests for a hearing were denied in an order issued November 3, 1995. In deciding this appeal, I have reviewed the entire administrative record, including the application files of both parties maintained by the Division and the following documents submitted by the parties:

Received	Identification of document
06 Jun	Prowler appeal & request for hearing
	Exhibits 1 - 6:
	1. Federal groundfish fisheries closure reports (1987-1990)
	2. Security agreement w/ First Bank of Ketchikan [2-7-19??]
	3. Gulf of Alaska longline survey [2-5-90]
	4. Gulf of Alaska longline survey [10-17-90]
	5. NOAA Tech. Memo NMFS-AFSC-39 re: 1988 GOA longline survey [6-94]
	6. NOAA Tech. Memo NMFS-AFSC-40 re: 1989 GOA longline survey [5-94]
	Affidavits:
	P Frank J. Brown
	P Theresa L. Coyle
	P Douglas Bart Eaton
	P John Winther
	P John Winther (II)
12 Jun	Bill Lewis letter requesting denial of Prowler's request for hearing
16 Jun	Jeffery Troutt letter re: error in Winther affidavits [6-14-95]
28 Jun	Supplemental affidavit of John Winther [6-20-95]
06 Jul	Samuelson's reply to Prowler appeal [7-7-95]
	Exhibits A - D:
	A: Abstract of title
	B: Sale agreement
	C: Release
	D: Affidavit of Gainhart Samuelson [7-6-95]
17 Jul	Prowler's reply to Samuelson's opposition [7-17-95]
	Affidavit of Douglas Bart Eaton (II) [7-15-95]
14 Aug	Samuelson's response to Prowler's Jul. 17 reply [8-10-95]

23 Aug	Prowler's response to Samuelson's Aug. 10 submission

Received	Identification of document
29 Aug	Samuelson's opposition to Prowler's Aug. 23 submission
	Affidavit of William C. Lewis [8-28-95]
31 Aug	Prowler's response to Samuelson's Aug. 28 brief [8-31-95]
05 Sep	Jeffery Troutt letter re: not filing response to last Samuelson brief
06 Sep	Samuelson's response to Prowler's Aug. 31 brief (response)

ISSUES

1. Whether one-third of the qualifying pounds resulting from certain sablefish landings made from the F/V PROWLER during the period April 5, 1985, through June 9, 1989, were properly allocated to Gainhart Samuelson and denied to the Prowler Partnership.

2. Whether qualifying pounds for certain sablefish landings from the F/V PROWLER in 1987 and 1988, involving fish caught during research conducted under NMFS contracts, were properly denied to both parties.

BACKGROUND

A United States Coast Guard Abstract of Title for the F/V PROWLER shows that the vessel was purchased by John Winther on April 1, 1985. Mr. Winther transferred ownership of the vessel on April 5, 1985, to "John R. Winther, 1/3, Gainhard [sic] 'Bud' Samuelson, 1/3 & Douglas Bart Eaton, 1/3." On September 2, 1986, Mr. Eaton transferred his 1/3 interest in the vessel to Omega-3, Inc., which is a corporation that is apparently solely owned by him. On February 2, 1990, Mr. Samuelson's interest in the F/V PROWLER was transferred to John R. Winther and Omega-3, Inc., who since that date have each held a one-half interest in the vessel.

Shortly after obtaining the vessel in April 1985, Messrs. Winther, Samuelson, and Eaton all signed a "CO-OWNERSHIP AGREEMENT" in which they recited that they owned the F/V PROWLER "as tenants-in-common, each owning an undivided interest in the Vessel." In ¶3 of the agreement, the three men stated that:

> In no event shall the Vessel be considered to be owned or operated by a partnership composed of the parties and each party acknowledges that he is an independent contractor and not a partner or joint venturer with respect to the Vessel or to the

management or operation thereof.

In an affidavit dated May 31, 1995, Seattle attorney Frank J. Brown stated that he drafted the co-ownership agreement, rather than a partnership agreement, in order to allow Capital Construction Funds to be used for the purchase of a future interest in the vessel. In separate affidavits, using virtually identical language, Mr. Eaton [May 19, 1995] and Mr. Winther [June 2, 1995] stated that Mr. Eaton's attorney "insisted" on the inclusion of paragraph 3 because "NMFS would not recognize a partnership for CCF [Capital Construction Fund] purposes."

Notwithstanding the above-stated evidence of the ownership of the F/V PROWLER, the Appellant states in its appeal that "all three parties to the co-ownership agreement agree that the co-venture in fact operated as a partnership and that partnership owned the vessel . . .." [Appeal at 12.] The Appellant argues that the Prowler Partnership has never been dissolved. Therefore, argues Appellant, the qualifying pounds from the F/V PROWLER landings should not be allocated to the Respondent either as an individual or as a successor in interest to a dissolved partnership. Rather, the Appellant argues that 100 percent of the qualifying pounds should be allocated to the Prowler Partnership.

The Respondent argues that the qualifying pounds from the F/V PROWLER were properly allocated to him as an individual. Alternatively, the Respondent argues that even if the Prowler Partnership had owned the vessel beginning in 1985, the partnership was dissolved on June 30, 1989, in accordance with an "Agreement for Sale of Ownership Interest," signed by the three partners on June 9, 1989. The agreement provided, among other things, that on June 30, 1989, the partners "shall terminate the joint venture partnership that operates the F/V PROWLER." The agreement also provided for the sale of the Respondent's ownership interest in the vessel to Mr. Winther and Mr. Eaton. The Respondent argues that because the partnership was dissolved by this agreement, he should receive the allocation as a successor in interest to that partnership. [Respondent's Reply at 4-5.] The Respondent had applied for Quota Share as a successor in interest to the Prowler Partnership.

The Appellant argues that the above-mentioned agreement and the sale of Respondent's interest in the F/V PROWLER did not have the effect of dissolving the partnership. In the Appellant's view, because the partnership was never dissolved there can be no successor in interest to the partnership. The Appellant also argues that a release signed on February 10, 1990, by Mr. Samuelson and Mr. Eaton (as president of Omega-3, Inc.) is evidence of the parties' understanding that the partnership (co-venture) continued in existence after the Respondent's relationship with it was terminated, and that the partnership (of Mr. Winther and Omega-3, Inc.) was the successor in interest to the Respondent's share of the business. The Appellant further asserts that by the release the Respondent transferred to the partnership any claim he might have to Quota Shares relating to the F/V PROWLER.

Both parties also argue that the IAD improperly denied them the allocation of qualifying pounds for certain sablefish landings from the F/V PROWLER in 1987 and 1988, involving fish caught during

research conducted under NMFS contracts. The Appellant argues that these were "legal landings" as defined in IFQ regulations and that, therefore, the partnership should receive the allocation of all the resulting qualifying pounds. The Appellant also argues that the vessel charter under which the fish were caught does not constitute a "vessel lease" under the IFQ program and that, therefore, any qualifying pounds should be allocated to the owner of the vessel.

The Appellant made three additional arguments with respect to the denial of the qualifying pounds relating to the fish taken under the NMFS contracts: (1) that the denial violates the Administrative Procedure Act [APA][2] because there is no rational basis for distinguishing it from standard commercial fishermen; (2) that the denial violated equal protection and due process under the Fifth Amendment to the United States Constitution by unjustifiably discriminating between the Appellant and others engaged in the same business; and (3) that the denial was an unconstitutional taking of Appellant's property right.

The Respondent argues that he should receive an allocation of one-third of any qualifying pounds related to the NMFS contracts.

DISCUSSION

1. Were one-third of the qualifying pounds resulting from certain sablefish landings made from the F/V PROWLER during the period April 5, 1985, through June 9, 1989, properly allocated to Gainhart Samuelson and denied to the Prowler Partnership?

Under the IFQ program, as implemented by the Division, an applicant for an initial issuance of QS may receive credit only for legal landings of Pacific halibut or sablefish that were made from a vessel owned or leased by the applicant at the time of the landings. See 50 C.F.R. § 676.20. Both parties in this appeal claim to have been the owner of the F/V PROWLER at the time the landings in question were made. Federal regulation 50 C.F.R. § 676.20(a)(1)(ii) provides that:

> (ii) Evidence of vessel ownership shall be limited to the following documents, in order of priority:
>
> (A) For vessels required to be documented under the laws of the United States, the U.S. Coast Guard abstract of title issued in respect of that vessel:
>
> (B) A certificate of registration that is determinative as to vessel ownership;
>
> (C) A bill of sale.

[2]Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1994).

Under this regulation, the best evidence of vessel ownership, if it exists, is a Coast Guard abstract of title. Absent any evidence that an abstract of title is erroneous or fraudulent, the Division is required to accept that document as proof of ownership. The abstract presented in this appeal shows that during the period April 5, 1985, through February 2, 1990, the Respondent held a one-third ownership interest in the F/V PROWLER. Neither party presented a certificate of registration or bill of sale for the vessel, but the abstract of title lists February 2, 1990, as the date of the Bill of Sale. Both parties did submit a copy of the "Agreement for Sale of Ownership Interest," executed by all three owners on June 9, 1989. That date is referenced in ¶1 of the "Release" [executed February 10, 1990] as the date on which the obligation was created to pay the Respondent for purchase of the vessel. June 9, 1989, is also the date listed by the Respondent in his Request for Application and in his Application for Quota Share as the final date of his ownership interest.

Although the Appellant argues that all three owners of the F/V PROWLER agree that the vessel was owned by the Prowler Partnership, no documents were presented that establish the partnership as owner. To the contrary, the "CO-OWNERSHIP AGREEMENT" signed by all the owners clearly states that they owned the vessel "as tenants-in-common, each owning an undivided interest in the Vessel." The affidavits of Mr. Brown (the drafting attorney), Mr. Winther, and Mr. Eaton all verify that they knowingly and intentionally represented to NMFS that the F/V PROWLER was not and would not be owned or operated by a partnership. Having made such representations to NMFS in order to benefit from Capital Construction Funds, the parties should not now be allowed to disavow those representations in order to obtain a different set of benefits from NMFS.

The Appellant asserts that the F/V PROWLER has been *operated* by the Prowler Partnership since 1985. Even if true, that would not establish that the vessel was *owned* by the partnership. And it is ownership of a vessel, not mere operation, that governs who should receive credit for landings made from the vessel for the purposes of the IFQ program. The Appellant has failed to present any persuasive evidence that it ever owned the F/V PROWLER. Therefore, I find, by a preponderance of the evidence, that the Respondent as an individual held a one-third ownership interest in the F/V PROWLER during the period April 5, 1985, through June 9, 1989. Therefore, I also find that the Division properly allocated to the Respondent as an individual one-third of the qualifying pounds of sablefish from the F/V PROWLER for the period April 5, 1985, through June 9, 1989.

Having decided that the allocation to the Respondent as an individual was proper, it is unnecessary to decide (and I do not decide) whether the Prowler Partnership was dissolved when the Respondent sold his ownership interest in the F/V PROWLER and whether the Respondent is qualified for an allocation of qualifying pounds as a successor in interest to a partnership. Because the qualifying pounds of sablefish already issued to the Prowler Partnership are not in dispute in this appeal, I also do not decide whether that issuance was proper.

The Appellant argues that the Respondent transferred his interest in any Quota Shares to the Appellant

by signing the release on February 10, 1990. The Appellant relies on ¶5 of the release, which provides:

> 5. This agreement to receive payment and release of any and all claims is a final settlement between the parties of any partnership claim known or unknown and this settlement is a final settlement from which no claim of any manner known or unknown now or in the future may be brought.

According to the Appellant, this language shows that the Respondent, among other things, "disclaimed the right to all of the benefits of the Co-venture" and "did not intend to reserve his 'fishing rights.' Rather, he abdicated them." [Appellant's Reply to Respondent's Opposition, July 17, 1995, at 3-4.] Mr. Winther and Mr. Eaton both state in affidavits that they entered into the release with Mr. Samuelson "in order to clarify our intent that the shares associated with the fishing activity of the PROWLER were to stay with the ongoing PROWLER co-venture." [Barton affidavit, May 19, 1995, at 3; Winther affidavit, June 2, 1995, at 3.]

The Appellant further asserts that during negotiations for the sale of the Respondent's interest in the F/V PROWLER, the parties understood and agreed that any future IFQ rights of Mr. Samuelson would go to the partnership along with the vessel. Mr. Eaton states in an affidavit that during sale negotiations in 1989,

> "I told him [Samuelson] that when he left the partnership he would lose all potential future rights in any fisheries management system that might be implemented in the future. Mr. Samuelson replied that he did not care one way or another about retaining future benefits under any potential fisheries management system. . . . I understood his statement that he "did not care" to mean that he agreed that any future fishing benefits would continue to be held by the venture after he left the venture." [Barton affidavit (II), July 15, 1995, at 2.]

The Respondent denies that the parties ever discussed transferring potential future fishing rights along with his interest in the vessel. [Samuelson affidavit, July 6, 1995, at 1-2.] Further, the Respondent correctly points out that the release does not mention fishing rights of any kind. [Respondent's reply to appeal, at 10.]

I am not persuaded that the evidence supports Appellant's argument. The conflicting affidavits of the parties are inconclusive. By its terms, the release appears to relate only to a release of any claims that the Respondent may have had (then or in the future) against Mr. Winther or Omega-3, Inc., relating to their purchase of the F/V PROWLER. Whatever rights the release may have transferred, it did not clearly transfer the Respondent's eligibility for the initial issuance of Quota Shares. The Division has consistently refused to recognize and enforce private agreements that purport to assign eligibility for the initial issuance of Quota Shares. Each applicant for Quota Shares must meet the requirements of 50

C.F.R. § 676.20 to receive an initial issuance. Section 676.20(a)(1) provides, in part, that "Qualified persons, or their successors in interest, must exist at the time of their application for QS." With respect to any application for the initial issuance of Quota Shares, the Division does not recognize a successor in interest if the "qualified person" still exists.[3]

The parties to this appeal have not briefed the question of whether the Division's interpretation of the successor in interest provision is correct. Therefore, for the purposes of this appeal only, I will presume that this *is* a reasonable interpretation of an unclear regulatory provision. Here, Mr. Samuelson, of course, still exists and therefore the Appellant is not his successor in interest for purposes of the IFQ program. I do not, however, decide whether the release creates any contractual rights that the Appellant can seek to enforce in another forum. I merely decide that the release does not require the Division to allocate any qualifying pounds to the Appellant.

2. Were qualifying pounds for certain sablefish landings from the F/V PROWLER in 1987 and 1988, involving fish caught during research conducted under NMFS contracts, properly denied to both parties?

As previously stated, under the IFQ program, as implemented by the Division, an applicant for an initial issuance of QS may receive credit only for legal landings of Pacific halibut or sablefish that were made from a vessel owned or leased by the applicant at the time of the landings. See 50 C.F.R. § 676.20. A "legal landing of sablefish," for purposes of the IFQ program, is defined as "sablefish harvested with fixed gear and landed in compliance with state and Federal regulations in effect at the time of the landing." 50 C.F.R. § 676.20(a)(1)(v).

The Appellant argues that its landings of sablefish harvested under the terms of its 1987 and 1988 contracts with NMFS constitute legal landings under the IFQ program because the fishing was conducted pursuant to federal regulations. Specifically, the Appellant states that it complied with federal acquisition regulations in obtaining the contracts, and with other federal regulations regarding navigation, effluent discharge, safety, licensing, and the environment. The Appellant states that the Division was under the "mistaken assumption" that the definition of "legal landings" referred only to applicable fishery management regulations. The Appellant asserts that the definition excludes only illegal fishing, and that "There can be little question that the actual activity of the PROWLER was fully authorized and legal under the Magnuson Act." Therefore, the Appellant concludes, the Division improperly refused to allocate qualifying pounds for the landings of the sablefish harvested under the NMFS contracts. [Appeal at 24-26.]

---

[3]One exception to this policy is that the Division does issue Quota Shares to a successor in interest of a qualified person who still exists if the successor in interest is a partnership or corporation under which the qualified person has continued to do business. This exception is not automatic; it must be requested by the qualified person.

The Appellant's arguments are misguided. They are based on a fundamental misreading of the purpose and scope of the IFQ program. The definition of "legal landings" must be read in context. The IFQ regulations govern only the *commercial fishing* for sablefish and Pacific halibut in specified waters. 50 C.F.R. § 676.10(b). The activities of the F/V PROWLER while under the NMFS contracts did not constitute commercial fishing, a fact that the Appellant acknowledges.[4] In fact, for purposes of the IFQ program, these activities did not constitute *fishing* at all. The authority for the regulation of the commercial fishing of sablefish under the IFQ program is the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1994). The Magnuson Act expressly excludes from the definition of "fishing" any "scientific research activity which is conducted by a scientific research vessel." 16 U.S.C. § 1802(10) (1994). Although the terms "scientific research activity" and "scientific research vessel" are not defined in the Magnuson Act, the Gulf of Alaska longline surveys conducted under the NMFS contracts are clearly "scientific research activity."[5] And it is a reasonable reading of the statute to conclude that the F/V PROWLER acted as a "scientific research vessel" while serving as a NMFS charter vessel during the survey activities. Thus, because the activities of the F/V PROWLER under the NMFS contracts did not constitute *fishing*, it is irrelevant that they may not have violated any state or federal regulations in effect at the time of the landings. Activities that are not *fishing*, let alone *commercial fishing*, cannot serve as the basis for the allocation of qualifying pounds or the award of Quota Shares under the IFQ program.

The Appellant makes three additional arguments regarding the denial of the qualifying pounds relating to the fish taken under the NMFS contracts. The Appellant argues that there is no rational basis for distinguishing between "standard commercial fishermen" and "those who fished under contract with NMFS." This, the Appellant contends, arbitrarily creates a small but separate class[6] of ineligible vessels, and such segregation and disparate treatment violates the Administrative Procedure Act [APA]. The Appellant argues that the distinction made by the Division also violates the Appellant's rights to equal protection and due process under the Fifth Amendment to the United States Constitution. Finally, the Appellant argues that denial of the qualifying pounds is an unconstitutional taking of its property in violation of the Fifth Amendment.

The Appellant's arguments that the denial of the qualifying pounds relating to the fish taken under the

---

[4]The Appellant states in its appeal that the F/V PROWLER was removed from the commercial fisheries between June 24 and October 12, 1988, and between July 6 and September 17, 1989. [Appeal at 4.]

[5]The 1987 NMFS contract, for example, provides: "The above-specified charter is for an assessment survey that is designed to perform scientific research necessary to acquire information to determine the status of sablefish and other groundfish stocks." Contract No. 50ABNF700127, § B.1.

[6]The Appellant notes in its appeal: "This class is undeniably small. It consists of only the PROWLER and the OCEAN PROWLER . . .." [Appeal at 30, n. 18.]

NMFS contracts was in violation of the APA and the United States Constitution are not persuasive. As previously discussed, the Magnuson Act distinguishes between *fishing* and *scientific research activity*. The Division is required to implement the IFQ program, and to interpret and apply the IFQ regulations, in a manner that is consistent with the Magnuson Act. Therefore, the Division is required by law to distinguish between *fishing* and *scientific research activity* when making determinations about the allocation of qualifying pounds and the issuance of Quota Shares. As an Appeals Officer, I am without authority to rule on the constitutional validity of statutory distinctions; such arguments should be addressed in a judicial forum.

The Appellant's argument that the IAD constitutes an unconstitutional taking of its property is without merit. The Appellant asserts that "during the course of performance of the contracts and at other times" it was assured by NMFS personnel that the partnership would be entitled to credit for fish caught by the F/V PROWLER during the longline surveys. In particular, the Appellant states that the chief of the Division in early 1994 said he believed that the partnership "was entitled to Quota Shares based upon the fish caught during the contract's performance." [Second Affidavit of John Winther, June 2, 1995, at 3; Supplemental Affidavit of John Winther, June 20, 1995, at 1-2.] The Appellant then asserts that if Mr. Winther had known, while negotiating the NMFS contracts, that the Appellant would not receive credit for the vessel's catch history, he "would have seriously considered refusing to enter into the contracts." Therefore, argues the Appellant, obtaining IFQ credit for fishing under the contracts became "an implicit part of the contract[s]." According to the Appellant, this, in turn, created a property right to "eligibility for IFQ status," which has been unconstitutionally taken without public use and just compensation.

It is not clear how the statements allegedly made by NMFS personnel, even if relied upon by the Appellant when deciding whether to accept the NMFS contracts, translate into a constitutionally protected property right. First, the statements must have been made in 1987 or 1988 in order to have had any effect on the Appellant's decisions regarding the NMFS contracts. The agency cannot be bound by statements that were allegedly made before the IFQ program and the IFQ regulations were adopted. Second, determinations regarding the allocation of qualifying pounds and the issuance of Quota Shares are governed by the IFQ regulations, not by the "implicit" terms of contracts relating to scientific research activity. Finally, the IFQ regulations specify that Quota Shares and IFQ permits are not a protected property right. Federal regulation 50 C.F.R. § 676.20(g) provides:

> (g) Quota shares allocated or permits issued pursuant to this part do not represent either an absolute right to the resource or any interest that is subject to the "takings" provision of the Fifth Amendment of the U.S. Constitution. Rather, such quota shares or permits represent only a harvesting privilege that may be revoked or amended subject to the requirements of the Magnuson Fishery Conversation and Management Act and other applicable law.

If Quota Shares and IFQ permits are not subject to the takings provision, then "eligibility for IFQ status" is likewise not a property right subject to the takings provision.

FINDINGS OF FACT

1. The Respondent as an individual held a one-third ownership interest in the F/V PROWLER during the period April 5, 1985, through June 9, 1989.

2. The release signed by Gainhart Samuelson and Douglas Bart Eaton on February 10, 1990, did not transfer the Respondent's eligibility for the initial issuance of Quota Shares.

CONCLUSIONS OF LAW

1. The existence of the release signed by Gainhart Samuelson and Douglas Bart Eaton on February 10, 1990, does not require the Division to allocate any qualifying pounds to the Appellant.

2. The Appellant is not a successor in interest to the Respondent for purposes of the IFQ program.

3. The Division properly allocated to the Respondent one-third of the qualifying pounds resulting from certain sablefish landings made from the F/V PROWLER during the period April 5, 1985, through June 9, 1989, and properly denied these same qualifying pounds to the Appellant.

4. The activities of the F/V PROWLER while under the 1987 and 1988 NMFS contracts relating to Gulf of Alaska longline surveys did not constitute *fishing* under the Magnuson Act; rather, they constituted *scientific research activity conducted by a scientific research vessel*.

5. Activities that are not *fishing*, let alone *commercial fishing*, cannot serve as the basis for the allocation of qualifying pounds or the award of Quota Shares under the IFQ program.

6. The Division is required by law to distinguish between *fishing* and *scientific research activity* when making determinations about the allocation of qualifying pounds and the issuance of Quota Shares.

7. The Division properly denied both parties in this appeal an allocation of qualifying pounds for certain sablefish landings from the F/V PROWLER in 1987 and 1988, involving fish caught during research conducted under NMFS contracts.

DISPOSITION

The Initial Administrative Determination that was the subject of this appeal is AFFIRMED on the

grounds stated in this decision. This decision takes effect December 8, 1995, unless by that date the Regional Director orders review of the decision.

The Respondent in this appeal still has an opportunity to receive QS and the corresponding IFQ for the 1995 fishing season, and desires to fish sablefish during the remainder of this season, which ends November 15, 1995. Therefore, I recommend that the Regional Director expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm at least that portion of the decision that affirms the allocation of qualifying pounds to the Respondent, and thereby give at least that portion of the decision an immediate effective date.

Edward H. Hein
Chief Appeals Officer